TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]95.

GEORGE R. ELDER, SUCCESSOR IN INTEREST TO SAMUEL McMILLEN, DECEASED; ALICE J. McCOMBE, ADMINISTRATRIX OF JOHN McCOMBE, DECEASED, AND ROWENA E. McCOMBE, BY ALICE J. McCOMBE, HER NEXT FRIEND, PLAINTIFFS IN ERROR,

vs.

TINGLEY S. WOOD, IMPLEADED WITH MARY M. BULLARD, ANNA L. FINNERTY, AND CECILIA J. WAHRER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

[redacted]

(28,265)

(20,358.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 393.

GEORGE R. ELDER, SUCCESSOR IN INTEREST TO SAMUEL McMILLEN, DECEASED; ALICE J. McCOMBE, ADMINISTRATRIX OF JOHN McCOMBE, DECEASED, AND ROWENA E. McCOMBE, BY ALICE J. McCOMBE, HER NEXT FRIEND, PLAINTIFFS IN ERROR,

vs.

TINGLEY S. WOOD, IMPLEADED WITH MARY M. BULLARD, ANNA L. FINNERTY, AND CECILIA L. WAHRER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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1–5 UNITED STATES OF AMERICA:

Be it remembered, That at the December Term, A. D. 1902, of the District Court of the Fifth Judicial District of the State of Colorado, held within and for the County of Lake, commencing on Monday, the 1st day of December, A. D. 1902, begun and held in the City of Leadville, County of Lake and State of Colorado, at the Court House therein.

Present: Hon. Peter L. Palmer, Judge of said Court, presiding at request of Hon. Frank W. Owers, Judge of said Court. F. E. Purple, Esq., District Attorney. P. H. Herrington, Esq., Bailiff of said Court. L. F. Long, Esq., Sheriff of Lake County. J. H. Dunn, Esq., Clerk of said Court.

The following, among other proceedings, were had, to-wit:

Filed in Supreme Court Sept. 16, 1903.
HORACE G. CLARK, *Clerk.*

* * * * * * *

6 And afterwards and on, to-wit: the 1st day of December, 1902, it being one of the regular juridical days of the December Term, 1902, of said Court, the following proceedings, *inter alia,* were had and entered of record in said court, before the Hom. P. L. Palmer, District Judge, presiding at the request of Hon. Frank W. Owers, Judge of said Court, to-wit:

5023.

ALICE J. MCCOMBE, Adm., ET AL.
vs.
T. S. WOOD ET AL.

At this day come the plaintiffs herein by Messrs. Elder and Ewing their attorneys and the defendants by Charles Cavender, Esq. their attorney. Thereupon upon consent, the replication filed by plaintiff Elder is to be considered the replication of plaintiff McCombe except paragraph number seven. Thereupon the motion of defendant Wood that plaintiff McMillen and his successor in interest Elder be stricken out as a party plaintiff is denied at the present time, without prejudice.

7 Thereupon this cause comes on to be tried to the Court, without a jury, a jury herein being expressly waived by all the parties hereto. Thereupon the motion of defendant Wood and the renewal of said motion, that this case be dismissed as to Plaintiff Elder is denied, to which ruling defendant excepts. Thereupon the trial of the issues herein being not concluded at the hour of adjournment, the further hearing of same is continued to December 2nd, 1902.

And afterwards and on to-wit: the 2nd day of December, A. D. 1902, it being one of the regular juridical days of the December Term, 1902, of said Court, the following proceedings, *inter alia*, were had and ordered of record before the same trial judge, to-wit:

5023.

ALICE J. McCOMBE, Adm., ET AL.
vs.
T. S. WOOD ET AL.

At this day come again the said parties by their attorneys respectively. Thereupon the trial of the issues herein is resumed.

And the court having heard the evidence introduced herein, the arguments of counsel, and being now well advised in the premises, doth find the issues herein joined in favor of the plaintiffs and against the defendants, and orders a decree to be prepared in accordance with said findings.

Thereupon defendant Wood excepts to the judgment of the court.

And afterwards and on, to-wit: the 3rd day of December, 1902, it being one of the regular juridical days of the March Term, 1902,
of said Court, the following proceedings, *inter alia*, were had
8 and entered of record in said court, to-wit:

5023.

ALICE J. McCOMBE, Adm., ET AL.
vs.
T. S. WOOD ET AL.

At this day comes the plaintiff herein by J. A. Ewing, Esq., and on petition of Alice J. McCombe and Rowena Eleanor McCombe are substituted as parties plaintiff in place of John McCombe, deceased. Thereupon the sum of Sixty Dollars is paid into the registry of the Court by Messrs. Elder and Ewing for the use of defendant, T. S. Wood.

And afterwards and on, to-wit: the 2nd day of March, A. D. 1903, it being one of the regular juridical days of the March Term 1903 of said Court, the following proceedings, *inter alia*, were had and entered of record in said court, to-wit:

STATE OF COLORADO, *County of Lake, ss:*

In the District Court within and for said County and State.

5023.

ALICE J. McCOMBE and ROWENA McCOMBE, by ALICE J. McCOMBE, Her Next Friend of Her Own Selection, Heirs at Law of John McCombe, Deceased, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Plaintiffs,

vs.

TINGLEY S. WOOD, MARY L. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, née CECELIA L. FINNERTY, Defendants.

9 *Decree.*

This cause having been regularly called for trial by the Court, Peter L. Palmer, presiding, and tried by the Court December 1st and 2nd, 1902, the plaintiffs appearing by their counsel, John A. Ewing and George R. Elder, Esq., and the defendants appearing by their counsel, Charles Cavender and Thomas A. Dickson, Esqs., a jury being waived by both plaintiffs and defendants, the Court having heard the evidence adduced on behalf of plaintiffs and defendants, and the arguments of counsel, and being fully advised in the premises, doth find the issues in said cause for the plaintiffs against said defendants.

It is therefore ordered, adjudged and decreed, that the plaintiffs have judgment as prayed for in their complaint, and replications herein against the defendants, and each and all of them.

Thereupon it is considered, ordered, adjudged and decreed by the Court, that the said plaintiffs, Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, Successor in Interest to Samuel McMillen, deceased, do have and recover of and from said defendant, Tingley S. Wood, an undivided one-third interest of the Comstock lode mining claim, United States Survey No. 3613, situated on Breece Hill, California Mining District, County of Lake, State of Colorado, the premises in controversy herein, as described in the complaint and replications of plaintiffs, and have and recover of and from the said defendant, Tingley S. Wood, their costs in this behalf laid out and expended, to be taxed and have judgment therefor, and let execution issue there-

10 for.

Wh*wrw*fore it is considered, ordered, adjudged and decreed by the Court, that the said plaintiffs, Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, Successor in Interest to Samuel McMillen, deceased, do have and recover of and from the said defendant, Tingley S. Wood, an undivided one-third interest in and to the following described part and portion of the said Comstock lode mining claim, United States

Survey No. 3613, situated in the California Mining District, County of Lake and State of Colorado, to-wit: Beginning at the intersection of line 4-1, Sur. No. 3613, Comstock lode, at So. 12° 18' E 172.12 ft. from Cor. No. 1, Comstock lode, and line 1-2, Sur. No. 667, Idaho lode at S. 79° 38' E 21.2 ft. from Cor. No. 2, Idaho lode; thence S. 79° 38' E. 186.4 ft. to intersection with line 1/2, Comstock lode; thence S 47° 21' E 490.6 ft. to intersection with line 3/4, Idaho lode; thence N. 79° 38' W 491.3 ft. to intersection with line 4-1, Comstock lode; then N 12° 18' W 281.8 ft. to place of beginning, containing 2.05 acres, excluding from the above described tract 0.23 acres in conflict with Sur. No. 718, Pennsylvania lode, leaving a net area of 1.82 acres, included in the supplemental application for patent for the Comstock lode as applied for June 19, 1897, in the United States Land Office, at Leadville, Colorado, being part of the premises in controversy herein, as described in plaintiff's complaint.

And it is ordered, Adjudged and Decreed as follows, vis.:

That whereas, the defendant, Tingley S. Wood, claims to own an undivided one-third interest in and to the Comstock lode mining claim, United States Survey No. 3613, Mineral entry No.
11 2411, in the California Mining District, Lake County, Colorado, containing nine and seventy-eight hundredths (9.78) acres of ground under and by virtue of the Treasurer's Deed made executed and delivered by M. F. Egan, Treasurer of Lake County upon the 8th day of August, A. D. 1892, to one C. T. Carnahan, recorded in Book 152, page 6, of the records of Lake County, Colorado, upon the 11th day of August, A. D. 1892, and by mesne conveyance from said C. T. Carnahan to defendant, Tingley S. Wood, by deed dated October 31st, 1893, recorded in Book 158, page 174, of the records of Lake County, Colorado, upon the 29th day of May, A. D. 1895, and that the said claim of title so made by Tingley S. Wood, the defendant aforesaid, constitutes and is a cloud upon the title of the said plaintiffs, Alice J. McCombe and Rowena E. McCombe by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, to the said undivided one-third interest in and to the said Comstock lode mining claim, United States Survey No. 3613, Mineral Entry No. 2411, as set forth and described in the complaint and replications of the plaintiffs herein.

And it is further Ordered, Adjudged and Decreed that the said title to the undivided one-third interest and part of the Comstock lode mining claim, United States Survey No. 3613, so claimed by the said Tingley S. Wood, is of no force, virtue, effect and value, and that the said Treasurer's deed, from M. F. Egan, Treasurer of Lake County, to Charles T. Carnahan, dated August 8th, 1892, which is recorded in the office of the Clerk and Recorder of Lake County, Colorado, on August 11th, 1892, in Book 152, page 6, is of no force, effect or virtue, and is void in so far as the same affects the plaintiff herein, and their title to the said undivided one-
12 third interest in and to the Comstock lode mining claim, United States Survey No. 3613.

And it is further Ordered, Adjudged and Decreed that the said

mesne conveyance and deed from C. T. Carnahan to the defendant, Tingley S. Wood, dated October 31, 1893, as far as the same attempts to convey the said undivided one-third interest of the said Comstock lode mining claim, United States Survey No. 3613, which deed is recorded in the office of the Clerk and Recorder of Lake County, Colorado, on the 29th day of May, A. D. 1895, in Book 158, Page 174, is of no force, effect or virtue, and is void in so far as the same affects the plaintiffs herein, Alice J. McCombe and Rowena E. McCombe by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder and their title to the said undivided one-third interest in and to the Comstock lode mining claim, United States Survey No. 3613, situate in California Mining District, County of Lake and State of Colorado.

And it therefore hereby Ordered, Adjudged and Decreed that all adverse claims of the defendant Tingley S. Wood, and all persons claiming or to claim said undivided one-third interest of said Comstock lode mining claim, United States Survey No. 3613, or any part of said interest, through or under said defendant Tingley S. Wood, are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, are and are hereby declared and adjudged to be the true and lawful owners of an undivided one-
sixth interest in and to the said Comstock lode mining claim,
13 United States Survey No. 3613, and every part thereof; and that the plaintiff, George R. Elder is, and is hereby declared and adjudged to be the true and lawful owner of an undivided one sixth interest in and to the said Comstock lode mining claim, United States Survey No. 3613, and every part thereof, as described in the complaint and replications herein, and that their title thereto is decreed and adjudged to be quieted against all claims, demands or pretentions of the defendant Tingley S. Wood, who is hereby perpetually estopped from setting up any claims thereto or any part thereof.

And it is further Ordered, Adjudged and Decreed that the said plaintiffs do have and recover their costs and charges in this suit, to be taxed against the said defendant, Tingley S. Wood.

To which judgment, finding and decree of the court and every part thereof, the defendant, Tingley S. Wood, excepts.

Thereupon defendant Wood prays an appeal to the Supreme Court of the State of Colorado, which is granted upon condition that within five months from the 3rd day of December, 1902, defendant Wood files a good and sufficient bond in the sum of $1000.00, to be approved by the clerk of this court; and time and seven months from December 3rd, 1902, is allowed defendant in which to tender his bill of exceptions herein.

It is further ordered that the above decree being entered on this 2nd day of March, 1903, be entered of record herein *nunc pro tunc* as of the 3rd day of December, 1902.

14 STATE OF COLORADO, *County of Lake, ss:*

In the District Court.

JOHN MCCOMBE, Plaintiff,
vs.
TINGLEY S. WOOD, MARY L. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, née CECILIA L. FINNERTY, Defendants.

Complaint.

Plaintiff Alleges:

First: That the defendants, Mary L. Bullard, Anna L. Finnerty and Cecilia L. Wahrer, née Cecilia L. Finnerty, are the children and sole and only heirs at law of Peter Finnerty, deceased.

Second: That the said Peter Finnerty during his lifetime, and one Wilhelimina Gude were the owners of the Comstock Lode Mining claim, Mineral Survey No. 3613, situate in California Mining District, Lake County, Colorado; and that, as such owners, on to-wit: the 28th day of October, 1884, applied to the United States Land Office at Leadville, Colorado, for a United States Patent for said lode mining claim, and that such proceedings were had on that application as that said claim on to-wit: the 31st day of December, 1884, went to entry on said application and a Receiver's receipt therefor was issued to said Finnerty and Gude, but thereafter said entry was cancelled and set aside, by the United States Land Office at Washington, D. C.

Third: That thereafter such cancellation, said entry was reinstated, as to all of said Comstock lode except that portion thereof which conflicts with and is included within the original surface boundaries of the Idaho Lode Mining Claim, Mineral Entry
15 No. 667; and, with reference to that portion, on the 21st day of September, 1896, by letter "N," it was ordered that the owners of said Comstock Lode might file in said United States Land Office at Leadville, Colorado, a supplemental application for patent.

Fourth: That plaintiff is and for more than seven years last past been the owner and entitled to the possession of, and until the happenings of the wrongs and injuries hereinafter complained of was, in possession of an undivided one third interest in and to said Comstock lode claim.

Fifth: That on to-wit: the 19th day of June, 1897, the defendants herein wrongfully and unlawfully ousted this plaintiff from the possession of said Comstock lode, and then and there filed in the United States Land Office, at Leadville, Colorado, a supplemental application for a United States Patent, for all that portion of said Comstock lode, which is as aforesaid within the surface boundaries of said Idaho lode, Mineral Entry No. 667, which said supplemental application for patent was made in the names of Tingley S. Wood, Mary L. Bullard, Anna L. Finnerty and Cecilia L. Wahrer, née Cecilia L. Finnerty.

Sixth: Plaintiff further alleges that said defendants, ever since the ouster aforesaid, have withheld and still do wrongfully withhold

and detain from plaintiff the possession of plaintiff's said undivided 1/3 interest in and to said Comstock lode mining claim, including that portion thereof so as aforesaid in conflict with said Idaho Lode Mining Claim, Mineral Entry No. 667.

Seventh: Plaintiff further avers that said Idaho lode mining claim, Mineral Entry No. 667 has long since been abandoned and that the same no longer exists as a lode mining claim, and that that portion thereof which is in conflict with the said Comstock lode belongs to and forms a part of said Comstock lode, which por-
16 tion is described as follows:

Beginning at intersection of line 4-1 Sur. No. 3613, Comstock lode at S. 12 deg. 18 min. E. 172.12 ft. from Cor. No. 1, Comstock lode, and line 1-2 Sur. No. 667 Idaho lode at S. 79 Deg. 38 min. E. 21.2 ft. from Cor. No. 2 Idaho lode; thence S. 79 Deg. 38 min. E. 186.4 ft. to intersection with line 1-2, Comstock lode; thence S. 47 Deg. 21′ E. 490.6 ft. to intersection with line 3-4 Idaho Lode; thence N. 79° 38 min. W. 491.3 ft. to intersection with line 4-1 Comstock Lode; thence N. 12 Deg. 18 min. W. 281.8 ft. to place of beginning, containing 2.05 acres, excluding from the above described tract 0.23 acres in conflict with Sur. No. 718 Pennsylvania lode, leaving a net area of 1.82 acres, included in this supplemental application for patent.

Eighth: Plaintiff further avers that said Comstock lode was duly discovered and located upon the public domain of the United States, and is a valid subsisting mining location, and that all that portion thereof not included within the surface boundaries of said original Idaho lode, Survey No. 667, has gone to entry aforesaid, and that that portion thereof so included within said Idaho lode, forms and constitutes a portion of said original Comstock lode, and that the owners of said Comstock lode, including the plaintiff, are entitled to a United States patent therefor.

Ninth: Plaintiff further avers that on to-wit: the 19th day of August, 1897, he filed his adverse in the United States Land Office at Leadville, Colorado, against said supplemental application for a United States patent to said portion of said Comstock lode, so in conflict with said Idaho lode as aforesaid, and thereby protested against the issuance of a patent to said portion of said Comstock lode, to the defendants herein, because of the matters aforesaid,
17 and that this suit is brought in support of said adverse, and to recover pos-ession of plaintiff's said interest in said Comstock lode.

Wherefore, Plaintiff prays judgment that he is the owner of an undivided one third interest in and to said Comstock lode mining claim, and for the possession thereof; and for such other and further relief as to the Court may seem equitable and just; and for costs of suit.

JOHN A. EWING AND
JOS. W. TAYLOR,
Attorneys for Plaintiff.

(Endorsement on the back:)
Case No. 5023. Dist. Court. John McCombe *vs.* T. S. Wood *et al.*

Complaint. District Court Lake County. Filed Sep. 17 1897. Jno. H. Dunn, Clerk, Per —— —— Deputy. J. A. Ewing, Jos. W. Taylor, Att'ys for Pl'ff.

18 STATE OF COLORADO, *Lake County:*

In the District Court of the Fifth Judicial District of Colorado, in and for the County of Lake.

JOHN MCCOMBE, Plaintiff,

vs.

TINGLEY S. WOOD, MARY L. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER née CECILIA L. FINNERTY, Defendants.

Summons.

The People of the State of Colorado, to the Defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of Lake County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or if served out of this county, or by publication, with thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint; and if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this state, then ten days additional to the time hereinabove specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought by plaintiff who prays judgment that he is the owner of an undivided one third interest in and to the Comstock Lode Mining Claim, and for the possession thereof;
19 & 20 and for such other relief as to the court may seem equitable and just; and for costs of suit, as will more fully appear from the complaint in said action to which reference is here made; and a copy of which is on file in this office.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will apply for judgment by default against you according to the prayer of said complaint.

Given under my hand and the seal of said Court in said County, this 17th day of September, A. D. 1897.

JOHN H. DUNN,
Clerk of District Court.
By JAMES J. CONNELL,
Deputy Clerk.

[OFFICIAL SEAL.]

STATE OF COLORADO, *Lake County, ss:*

I do hereby certify that I have duly served the within summons in the within stated action on this 22nd day of September, A. D.

1897, by delivering to and leaving with Tingley S. Wood, one of the within named defendants personally in the City of Leadville, County and State aforesaid, a copy of said summons October 1st, A. D. 1897. I further certify that after due and diligent search I am unable to find Mary L. Bullard, Anna L. Finnerty and Cecilia L. Wahrer, née Cecilia L. Finnerty.

THOMAS F. O'MAHONEY, *Sheriff.*
By PETER H. HARRINGTON, *Deputy.*

Endorsed: No. 5023. Summons. Lake County District Court. John McCombe, Plaintiff, *vs.* T. S. Wood *et al,* Defendants. State of Colorado, County of Lake, *ss:* Office of Sheriff of said County. Received Sept. 18, 1897. Thomas F. O'Mahoney, Sheriff, By Peter H. Harrington, Deputy. Sheriff's Fees: Service, 75 Mileage 25 Return 25. Total, $1.25. Filed this 1st day of Oct. A. D. 1897. Jno. H. Dunn, Clerk. Ewing & Taylor, Att'y for Pl'ff.

* * * * * * *

21 STATE OF COLORADO, *County of Lake, ss:*

In the District Court within and for said County and State.

JOHN MCCOMBE, Plaintiff,
vs.
TINGLEY S. WOOD, MARY L. BULLARD, ANNA L. FINNERTY and CECILIA L. WAHRER, née CECILIA L. FINNERTY, Defendants.

Separate Answer of Tingley S. Wood.

Comes now the defendant, Tingley S. Wood, and for his separate answer to the complaint of the plaintiff herein,

1st. Admits, upon information and belief, that the defendants, other than this defendant, are the sole and only heirs at law of Peter Finnerty, deceased;

2nd. Admits that the said Peter Finnerty, during his lifetime, and one Wilhelima Gude, prior to the 8th day of August, A. D. 1892, were the owners of the Comstock lode mining claim, Mineral Survey No. 3613, situate in California Mining District, Lake County, Colorado, and that as such owners on, to-wit: the 28th day of October, A. D. 1884, applied to the United States Land Office at Leadville, Colorado, for a United States patent for said premises, and that such proceedings were had that said claim on, to-wit: the 31st day of December, A. D. 1884, went to entry on said application and a receiver's receipt therefor was issued to said Finnerty and Gude, but thereafter said entry was cancelled and set aside by the United States Land Office.

22 3rd. This defendant admits that thereafter such cancellation said entry was reinstated as to all of the Comstock lode, except that portion thereof which conflicts with and is included within the original surface boundaries of the Idaho lode mining claim, and with reference to that portion it was ordered that the own-

ers of the said Comstock lode might file in said United States Land Office a supplemental application for patent.

4th. This defendant denies that the plaintiff is, or for more than seven years last past has been, or at any time has been the owner or entitled to the possession of an undivided one-third interest, or any interest, in or to said Comstock lode, and denies that until the happenings of the alleged wrongs and injuries set forth in the complaint, and this defendant denies that there were any wrongs or injuries at all,—the complainant was in possession of an undivided one-third, or any other interest at all, in or to said Comstock lode mining claim.

5th. This defendant denies that on, to-wit: the 19th day of June, A. D. 1897, or at any other time, or at all, the defendants herein, or either of them, wrongfully or unlawfully ousted the plaintiff herein from the possession of said Comstock lode, or any part thereof, but this defendant admits that on or about said date the defendants herein filed in the United States Land Office at Leadville, Colorado, a supplemental application for that portion of the Comstock lode within the surface boundaries of the Idaho lode and that said supplemental application was made in the names of the defendants herein.

6th. This defendant denies that said defendants, or either
23 of them, since the alleged ouster set forth in the complaint herein, or at all, have withheld or still do wrongfully withhold or detain from the plaintiff the possession of the plaintiff's alleged one-third interest in and to the said Comstock lode mining claim, for the reason, as this defendant alleges, that the plaintiff has not now and never has had any interest in or to said Comstock lode mining claim.

7th. This defendant admits, on his information and belief, that said Idaho lode mining claim has been abandoned and that portion thereof which was in conflict with the said Comstock lode belongs to said Comstock lode and that the same is correctly described in the 7th paragraph of the complaint herein.

8th. This defendant admits that said Comstock lode was duly discovered and located and is a valid, subsisting mining location, and that the entire lode, with the exception of the portion which conflicts with the Idaho lode, has gone to entry, and that that portion in conflict with the Idaho lode, Survey No. 667, is a portion of the original Comstock lode, and that the owners of the said Comstock lode are entitled to a United State patent therefor, but this defendant denies that the plaintiff is an owner in and to the Comstock lode, or any part hereof, or that he is entitled to the United States patent therefor, or for any part or portion thereof.

9th. This defendant admits that this suit is brought in support of a pretended adverse claim filed by the plaintiff herein in the United States Land Office against the issuance of a patent to the defendants herein, and that this suit is brought in support of said adverse and to recover possession of plaintiff's alleged interest in said premises, but this defendant denies that said plaintiff has any interest therein
or had any right to file said adverse or to file this suit in sup-
24 port of the same.

10th. And for a further and separate answer to the com-

plaint of the plaintiff herein, this defendant alleges that for the year 1888 said premises were subject to taxation and in said year taxes were duly and properly assessed against the same, and thereafter and on the 5th day of August, A. D. 1889, said taxes assessed against the interest theretofore owned and claimed by the said Wilhelmina Gude, to-wit: An undivided one-third interest in said Comstock lode mining claim, not having been paid as required by law, said interest was exposed to public sale by the County Treasurer of Lake County, Colorado, for the purpose of realizing the taxes so assessed and due thereon, and duly sold to Charles T. Carnahan and a treasurer's tax certificate of sale and purchase duly issued therefor, and that thereafter, said property not having been redeemed from said tax sale and more than three years having elapsed, the County Treasurer of said Lake County executed his deed for said premsies to the said Charles T. Carnahan, and thereafter and about the month of November, A. D. 1893, the said Charles T. Carnahan conveyed said premises to this defendant, Tingley S. Wood, and that since said time this defendant has been and now is the owner both in law and in equity of said premises through and by virtue of said tax sale as aforesaid.

11th. This defendant, further answering the complaint of the plaintiff herein, alleges that on the 8th day of August, A. D. 1892, the county treasurer of Lake County, under and by virtue of the statutes of the State of Colorado, issued his certain treasurer's deed for the undivided one-third interest in and to the Comstock lode mining claim, being the interest theretofore owned or claimed by Wilhelmina Gude, under and by virtue of the levy and sale of said taxes upon said premises for the year 1888 on the 5th day of August, A. D. 1899, and that said deed was duly recorded in the office of the County Clerk and Recorder on the 11th day of August, A. D. 1892, conveying said premuses to Charles T. Carnahan, and that thereafter, by a certain mesne conveyance, the said title of said Charles T. Carnahan became vested in this defendant, Tingley S. Wood, and that he has ever since said time been the owner and in the possession and entitled to the possession of said premises; that this suit was commenced, as appears from the filing of the complaint herein, on the 17th day of September, A. D. 1897, being more than five years after the issuance of said Treasurer's tax deed. This defendant alleges that by reason thereof and the delay of the plaintiff in bringing his said action he is estopped to deny the title and ownership and possession and right to the possession of the defendant herein under and by virtue of Section 3904 of Mills' Annotated Statutes of the State of Colorado, being Section 1 at page 320 of the Laws of 1885.

12th. This defendant alleges that he and his grantors have been in peaceable and undisputed possession of the premises in dispute in this action from the 11th day of August, A. D. 1892, to the 15th day of September 1897, and during all of said period paid all taxes legally assessed on said premises, and by reason thereof and the delay of the plaintiff herein in instituting his suit therefor, the said plain-

tiff is estopped to claim any title thereto under Section 2923 of Mills' Annotated Statutes of the State of Colorado.

26 13th. And this defendant alleges that he and his grantors, having color of title under and by virtue of the Treasurer's tax deed made in good faith to the premises in dispute in this action, paid all taxes legally assessed thereon and for improvements situate thereon for five successive years prior to the institution of this suit, to-wit: the years 1892, 1893, 1894, 1895 and 1896, and that by reason thereof the plaintiff is estopped to assert any title against this defendant or to bring any suit therefor in pursuance of Section 2924 of Mills' Annotated Statutes of the State of Colorado.

14th. This defendant further answering the complaint of the plaintiff herein, alleges that during the year 1895, he, as a co-owner in said Comstock lode mining claim, for the purpose of holding said claim under the provisions of the statutes of the United States concerning *an*nual labor, expended upon said claim the just and full sum of one hundred dollars and that no one claiming an interest in said premises having repaid the same to this defendant, he on the 10th day of February, A. D. 1896, caused a notice of forfeiture addressed to the estate and heirs of Peter Finnerty, deceased, who claimed to own all interest in said premises not owned by the defendant, and also addressed to all others whom it may concern, requiring them to refund a portion of the money so expended by him due upon the proportionate interest claimed by any other person in said premises, which said notice was duly published in The Evening Chronicle, a daily newspaper published at Leadville in Lake County, Colorado, being the paper published nearest to where said

27 claim is located, and that no one paid to him, within the six months required by law or at any time at all, the one-third of the one hundred dollars expended by him on the interest in dispute in this action, by reason whereof this defendant became and was and now is the legal and equitable owner of said interest.

Wherefore, Defendant prays judgment that he is the owner of said undivided one-third interest in said Comstock lode mining claim under and by virtue of the location thereof, the tax sale and conveyance thereunder and by reason of the forfeiture; and that he is entitled to the possession of the same.

CHAS. CAVENDER,
Attorney for Defendant, Tingley S. Wood.

(Endorsement on the back:)
No. 5023. In District Court. John McCombe *vs.* T. S. Wood *et al.* Answer of Tingley S. Wood. District Court Lake County. Filed Jun- 4 1901. Jno. H. Dunn, Clerk, Per —— —— Deputy. Chas. Cavender for Wood.

28 STATE OF COLORADO, *County of Lake, ss:*

In the District Court Within and for Said County and State.

No. 5023.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Plaintiffs,

vs.

TINGLEY S. WOOD, MARY L. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, née CECILIA L. FINNERTY, Defendants.

Separate Replication of George R. Elder to the Separate Answer of Tingley S. Wood.

Comes now the plaintiff, George R. Elder, and for Reply to the Separate Answer of Tingley S. Wood, defendant herein, alleges:

1. That he denies that the defendant Tingley S. Wood, is the owner of any interest whatever in the said Comstock lode U. S. Survey No. 3613, and alleges that the plaintiff, George R. Elder, is the owner of an undivided one-sixth interest therein.

2. Admits that Wilhelmina Gude was, prior to the 8th day of August, A. D. 1892, the owner of the undivided one-third interest in and to the Comstock Lode, U. S. Survey No. 3613, situate in California Mining District, Lake County, Colorado, and so continued to be such owner of the one-third interest of the Comstock lode, to and until April 5th, 1894, at which time by good and sufficient deed of conveyance, all of her said interest passed to and was vested in Samuel McMillen and John McCombe, which said deed was
29 made, executed and delivered upon the 5th day of April, A. D. 1894, and recorded among the Records of Lake County April 7th, 1894, in Book 148 at page 422.

Plaintiff admits that on the 28th day of October, A. D. 1884, the said Wilhelmina Gude and Peter Finnerty applied to the United States Land Office at Leadville, Colorado, for a United States Patent for said premises, and that on to-wit: the 31st day of December, A. D. 1884, the said premises went to entry on said application, and a Receiver's Receipt was issued to Peter Finnerty and Wilhelmina Gude for nine and 67/100 acres (9.67) of ground embraced in said survey; and that afterwards and upon May 21st, 1887, by Letter of the Honorable Commissioner of the General Land Office, the said entry was cancelled and set aside by the United States Land Office, to the extent of One and 8/10 (1.80) acres of ground, and that the balance of said Comstock Lode U. S. Survey No. 3613, consisting of 7.87 acres would be held for cancellation unless certain further evidence called for by the General Land Office was furnished by applicants, and that afterwards and upon March 12th, 1894, the entire entry and Receiver's Receipt of the said Comstock Lode U. S. Survey No. 3613 was cancelled by Letter of the Honorable Commissioner of the General Land Office of the United States.

3. Plaintiff admits that thereafter and on or about May 1st, 1895, Application for re-instatement of the Mineral Entry of the Comstock lode was made to the General Land Office, and by letter of May 22nd, 1895, said application for re-instatement was denied, and by letter of September 21st, 1896, said Entry was reinstated as to seven 88/100 (7.88) acres of said original entry, excluding from such re-
instatement that part or portion of the Comstock lode which
30 conflicts with and is included within the original surface boundaries of the Idaho Lode Mining Claim, and as to such portion, it was ordered that the owners of the said Comstock Lode might file in said United States Land Office a supplemental application for patent.

4. Plaintiff denies each and every allegation of the Fourth Defense of the Separate Answer of defendant, Tingley S. Wood.

5. Plaintiff denies each and every allegation of the fifth defense of the Separate Answer of defendant, Tingley S. Wood.

6. Plaintiff denies each and every allegation of the Sixth Defense of defendant Tingley S. Wood.

7. Plaintiff admits the Seventh allegation and admission of said Answer.

8. Plaintiff admits the discovery and location of the Comstock Lode, and that it is a valid, subsisting mining location, and that the owners of the Comstock Lode, viz: Alice J. McCombe, Administratrix and George R. Elder, the plaintiffs herein, and the heirs of Peter Finnerty, deceased, are entitled to a United States Patent therefor; and plaintiff denies all other allegations contained in the Eighth defense of the said Separate Answer of Tingley S. Wood.

9. Plaintiff admits that this suit is brought in support of an adverse claim in the U. S. Land Office, and plaintiff denies each and every allegation contained in the Ninth Defense of the said Separate Answer of Tingley S. Wood.

10. Plaintiff denies that for the year 1888, said premises were subject to taxation, and denies that in said year taxes were duly and properly assessed against the same, and plaintiff expressly alleges,
and so charges the fact to be, that by virtue of the letter of
31 the Honorable Commissioner of the General Land Office of the United States, dated May 21st, 1887, cancelling and holding for cancellation the said Receiver's Receipt, dated December 31st, 1884, and the further final cancellation of said entry by letter of the Honorable Commissioner of the General Land Office of the United States, dated March 12th, 1894, the said premises were not subject to taxation by the Assessor of Lake County for and during the year 1888, for the reason that the title to the land was in the United States at the time the assessment was attempted to be made, and the land was not taxable for the year 1888; that the right to a patent for said land was not complete, and the title still remained in the United States, and the claimants of said premises in the year 1888, to-wit: the heirs of Peter Finnerty and Wilhelmina Gude, had no taxable title therein; and plaintiff alleges that said premises did not in the year 1888 come under the "term," as stated in General Statutes of the State of Colorado, Sec. 2830 P. 824: "all lands within the

state to which title or the right to title has been acquired from the government of the United States," and plaintiff expressly alleges, and so charges the fact to be, that by reason of such cancellation upon May 21st, 1887, no entry was made upon said premises before the First day of May, A. D. 1888, as was required to subject same to taxation by the provisions of Sec. 2823 of the General Statutes of Colorado, of 1883, page 822.

And plaintiff further denies that said premises, consisting of an undivided one-third interest in said Comstock lode mining claim, the property of the said Wilhelmina Gude, were exposed to public sale and duly sold to Charles T. Carnahan upon the 5th day of August A. D. 1889, and a treasurer's tax certificate of sale and
32 purchase duly issued therefor; and that thereafter and upon August 8th, 1892, the County Treasurer of said Lake County executed his deed for said premises, and that thereafter by deed dated October 31st, 1893, and recorded May 29th, 1895, in Book 158, page 174, the said Charles T. Carnahan conveyed said premises to Tingley S. Wood, and this plaintiff denies that the said Tingley S. Wood is the owner of said premises, as alleged in the Tenth Defense of said defendant.

And plaintiff expressly alleges that at the time of said assessment, to-wit: in the year 1888, and at the time of said pretended and attempted sale in the year 1889, the title to said Comstock Lode remained and was vested in the United States for taxable purposes; that the assessor of Lake County assessed the said Comstock Lode as containing Nine and 67/100 acres of ground for and in and during the year 1888, while in truth and in fact the Receiver's Receipt therefor had been cancelled for a large part of said ground, to-wit: One and 80/100 acres of ground, being the ground then in litigation, and for which an adverse suit was still pending in the District Court of Lake County, between the owners of the Idaho Lode Mining Claim U. S. Survey No. 667, and the owners of the Comstock lode U. S. Survey No. 3613; and the balance of said ground, 7.88 acres, was held for cancellation by the Department, and finally cancelled by letter of March 12th, 1894, by reason of which facts said property was not subject to taxation in the year 1888, nor to Treasurer's sale for unpaid taxes in the year 1889, as alleged in said Tenth Defense of Defendant Tingley S. Wood. And plaintiff further alleges that the said 1.80 acres of ground so taxed without authority of
33 law is still unpatented, and the title thereto, at the date of the filing of this replication remains in the United States and is not now subject to taxation by the laws of the State of Colorado.

In further reply to said Tenth Defense plaintiff alleges that the Treasurer of Lake County, for and during the year 1888, carried the taxes against the Comstock Lode upon his books as received from the Assessor of Lake County, as "Comstock, No. 3613, 9.67 acres, $3.32;" that afterwards and upon July 7th, 1889, he attempted to advertise the said premises at Tax Sale, in the Leadville Herald-Democrat, commencing said advertisement in said newspaper upon and in its issue of Sunday morning, July 7th, 1889, and continuing said ad-

vertisement in said Sunday issue only,—July 14th, 1889, July 21st, 1889, July 28th, 1889, and August 4th, 1889. That in said advertised notice of sale the said treasurer entered said premises as "Comstock No. 3613, 9.67 acres, $3.32;" that by reason of said advertisement in a Sunday newspaper only and published and issued upon Sunday only, such notice was not a legal notice, and that all proceedings thereunder were without force and effect, and that the sale thereon was invalid and void. Wherefore, and by reason of the premises, the said Charles T. Carnahan and his grantee, the said Tingley S. Wood, could and did take no title to said premises by such void and invalid sale, advertisement and deed procured thereby. That said sale was and is void for the reason that the advertisement was made exclusively by publication in a newspaper issued on Sunday, and which sale was declared void and invalid by the decision of the Supreme Court of Colorado, in the case of Schwed *v.* Hartwitz *et al.*, reported in 23rd Colo., 187, and therefore such claim of title constitutes no defense.

34 11. Plaintiff denies each and every allegation of the Eleventh defense of defendant, and expressly alleges that the assessment of said premises and the tax sale thereof was beyond and outside of the power and jurisdiction of the taxing officers, and by reason of the fact that the title to said premises remained and continued in the United States from the 21st day of May, 1887, up to and until September 21st, 1896, and still remains in the United States at this date to a large portion thereof, and was and is therefore not subject to taxation by the State of Colorado, and by reason of the void and invalid advertisement of said premises for tax sale in a Sunday newspaper,—which would divest the owner of his property without due process of law, and that no estoppel can arise under and by virtue of Section 3904 of Mills Annotated Statutes of the State of Colorado, being Section 1, at page 320 of the Laws of 1885. And plaintiff further alleges that to entitle defendant to plead that statute, his title must have some other and firmer basis than a void assessment of property not subject to taxation, and a void process of sale by means of a tax sale notice published only on Sunday.

12. Plaintiff denies each and every allegation of the Twelfth Defense as alleged by defendant, and expressly alleges that the Assessor of Lake County attempted to assess the Comstock lode for the years 1892, 1893, 1894 and 1895 and 1896 as containing 9.67 acres of ground, and while and during said period of time, and all of such time, the Receiver's Receipt for such premises was absolutely cancelled and held void by the Commissioner of the General Land Office of the United States, and was therefore not subject to taxation, and that the title to 1.80 acres of said premises has never yet passed out of the Government of the United States, and is not now, nor

35 during all that period of time was subject to taxation; wherefore and whereby the payment of taxes so illegally and without power assessed can raise no estoppel in defendant's claim of title as against this plaintiff under Section 2923 of Mills Annotated Statutes of the State of Colorado.

13. Plaintiff denies each and every allegation of the thirteenth defense, as alleged by defendant, and expressly alleges the payment

of taxes upon premises not subject to taxation under the laws of the State of Colorado, under a void and invalid assessment, and while the title remains vested in the United States can raise no estoppel against this plaintiff, under Section 2924 of Mills Annotated Statutes of Colorado.

14. Plaintiff denies each and every allegation of the Fourteenth Defense of defendant, and expressly alleges that said defense is inconsistent and unintelligible, stating as it does, a claim of title under a tax sale in one paragraph, and in the next paragraph that the title still remained in the United States, and was subject to annual labor to keep up and continue said title; and plaintiff further alleges that the void tax sale as heretofore alleged, of the Comstock Lode, never vested in said Tingley S. Wood, the defendant, such a title to said premises which would entitle him to publish said notice of forfeiture, as against this plaintiff and his grantors, and plaintiff expressly alleges that at the date of such publication on the 10th day of February, A. D. 1896, plaintiff and his grantors were not in default for work and labor upon said premises for the year 1895; and plaintiff further alleges that the names and residences of the said Samuel McMillen and John McCombe, and the fact of their ownership in the said Comstock Lode were well known to said Tingley S. Wood; and plaintiff further alleges that the only co-owners of plaintiff's grantors who could take advantage of said default in work and labor, if it had occurred, were the heirs of Peter Finnerty; wherefore and whereby such allegation does not constitute any defense as against plaintiff's claim of title.

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And plaintiff further replying to said Answer, and as further matter of complaint, alleges against defendant, Tingley S. Wood:

1. That since the institution of this suit, and the filing of the original complaint, the said Tingley S. Wood has entered into and upon the said mine and premises, and has extracted therefrom large quantities of valuable ore, exceeding Eighty Thousand Dollars ($80,000.00) in value, and is still continuing to extract such ore from said premises, without any title or right thereto, and, unless stopped and prohibited by injunctive order of this court, will continue to trespass upon said property. And plaintiff alleges that he has suffered damages by reason of said trespasses, in the sum of Fifteen Thousand Dollars ($15,000.00).

2. Plaintiff further alleges that the claim of title made and maintained by the said Tingley S. Wood, defendant herein, constitutes a cloud upon plaintiff's title to an undivided one-sixth interest in and to the entire Comstock Lode.

3. Plaintiff alleges that he is the owner of an undivided one-sixth interest in and to the said Comstock Lode.

Wherefore, Plaintiff prays judgment against defendant, Tingley S. Wood:

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1. For recovery of possession of the 1.80 acres of ground sued for in his original complaint.

2. That he be decreed the owner of an undivided one-sixth interest of in and to the Comstock Lode, U. S. Survey No. 3613.

3. That the defendant, Tingley S. Wood, be adjudged and decreed and ordered to account to said plaintiff for all ores and valu-

able metals extracted by him from the said undivided one-sixth (1/6) interest in the said Comstock Lode, and when said amount is ascertained that plaintiff have judgment therefor.

4. That the said defendant may be adjudged and decreed to be estopped from having, holding or claiming any right, title or interest in and to the said undivided one-sixth (1/6) interest of the said Comstock Lode Mining Claim, so as aforesaid decreed to be the property of the plaintiff herein, as against this plaintiff.

5. That by the judgment and decree of this court, the title of the plaintiff in and to the undivided one-sixth interest of the said Comstock Lode may be quieted, and the said pretended title of the said Tingley S. Wood be by said decree adjudged to be a cloud upon said title of plaintiff, and he held for naught, and be decreed to be void and of no force or effect; and that the said treasurer's deed to Charles T. Carnahan, dated August 8th, 1892, and recorded August 11th, 1892, in the Recorder's Office of Lake County, Colorado, in Book 152, Page 6, be by such decree held for naught and void, in so far as the same affects the title of this plaintiff; and that by said decree the deed of the said Charles T. Carnahan to Tingley S. Wood, dated October 31st, 1893, recorded May 29th, 1895, in the Recorder's Office of Lake County, in Book 158, Page 174, be by such decree held for naught and cancelled, in so far as the same affects the said title of plaintiff.

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6. And that the defendant be forever enjoined and debarred from asserting any claim whatever in or to said Comstock Lode and premises adverse to the plaintiff herein.

7. And that plaintiff have judgment for his costs in this action.

8. And for such other and further relief as may be just and equitable in the premises.

9. And for the relief prayed for in the original complaint.

GEORGE R. ELDER,
Counsel Pro se.

STATE OF COLORADO, *County of Lake, ss:*

George R. Elder, the plaintiff above named, being first duly sworn, says as follows:

I am the plaintiff in the above entitled action.

I have read the foregoing replication and know the contents thereof, and that the same is true of my own knowledge.

GEORGE R. ELDER.

Subscribed and sworn to before me, this 21st day of July, A. D. 1902.

[OFFICIAL SEAL.]

JNO. H. DUNN,
Clerk District Court,
By JAMES J. CONNELL,
Deputy.

(Endorsement on the back:)

No. 5023. In the District Court of Lake County. Alice J. McCombe Administratrix and George R. Elder Pl'ffs *vs.* Tingley S. Wood *et al.*, Def'ts. Replication of George R. Elder. District Court

Lake County. Filed Jul. 21, 1902. Jno. H. Dunn, Clerk, Per ——, Deputy. George R. Elder, Attorney *pro se.*

* * * * * * *

45 Know all men by these presents, That we, TTingley S. Wood, as principal, and Percy McGeorge and A. V. Hunter, as sureties, of the County of Lake and State of Colorado, are held and firmly bound unto Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, Successor in interest to Samuel McMillen, deceased, in the penal sum of One Thousand ($1000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly, by these presents. Sealed with our seals, and dated at Leadville, this 25th day of April, in the year of our Lord one thousand nine hundred and three.

The condition of the above obligation is such, That whereas the said Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, successor in interest to Samuel McMillen, deceased, did, on the 3rd day of December, one thousand nine hundred and two, at a term of the District Court then being holden within and for the Fifth Judicial District in the County of Lake and State of Colorado, obtain a judgment and decree against the above bounden Tingley S. Wood, for the recovery of possession and quieting the title of the Comstock lode, especially the one-third interest in controversy in this action, and costs of suit, from which judgment and decree the said Tingley S. Wood has prayed for and obtained an appeal to the Supreme Court of said State of
46 Colorado.

Now, if the said Tingley S. Wood shall duly prosecute said appeal, and shall moreover pay the amount of the said judgment, costs, interest and damages, rendered and to be rendered against the said defendant Tingley S. Wood in case the said judgment and decree shall be affirmed in the said Supreme Court, or said appeal be dismissed for any reason, then the above obligation to be null and void, otherwise to remain in full force and virtue.

TINGLEY S. WOOD. [SEAL.]
PERCY McGEORGE. [SEAL.]
A. V. HUNTER. [SEAL.]

STATE OF COLORADO, *Lake County, ss:*

Personally appeared this day before me Robert H. Shipley, a Notary Public, of Lake County, Colorado, A. V. Hunter, of the County and State aforesaid, one of the securities on the bond of Tingley S. Wood, who, being duly sworn, deposes and says, that he is seized and possessed in his own right, over and above all his just debts and liabilities, in property not exempt by law from levy and sale under execution, of a clear, unincumbered estate of the value of

One Thousand ($1000.00) Dollars within the jurisdiction of this State.

A. V. HUNTER.

Subscribed and sworn to before me, this 25th day of April, A. D. 1903.

ROBERT H. SHIPLEY,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires May 19, 1904.

47–49 (Endorsed:) No. 5023. Appeal Bond. District Court of Lake County. To Supreme Court. A. J. McCombe *vs.* Tingley S. Wood. Approved and filed this 25th day of April, A. D. 1903. Jno. H. Dunn, Clerk, By James Connell, Deputy.

STATE OF COLORADO, *County of Lake, ss:*

I, John H. Dunn, Clerk of the District Court of the Fifth Judicial District of the State of Colorado, held within and for the County of Lake, do hereby certify that the above and foregoing is a true, full and correct transcript of record, complaint, summons, demurrer, answer of Wood, motion to strike, parts of answer demurrer, petition to substitute parties plaintiff, replication of Elder, petition and appeal bond, in the therein entitled action, the same being numbered 5023 on the dockets of said Court, and being the action of Alice J. McCombe, Administratrix, etc., *et al.*, Plaintiffs, against Tingley S. Wood *et al.*, Defendants, as the same now remain of record in my said office.

And I further certify that the bill of exceptions hereto attached is the original bill of exceptions filed herein.

Witness my hand and the official seal of said court at Leadville, Lake County, Colorado, this 1st day of September, A. D. 1903.

[SEAL.] JNO. H. DUNN,
Clerk District Court,
By JAMES J. CONNELL,
Deputy Clerk.

* * * * * * *

50 STATE OF COLORADO, *County of Lake, ss:*

In the District Court of the Fifth Judicial District.

No. 5023.

ALICE J. MCCOMBE, Administrtrix of John McCombe, Deceased; GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Plaintiffs,

vs.

TINGLEY S. WOOD, MARY L. BULLARD, ANNA L. FINNERTY; CECILIA L. WAHRER, née Cecilia L. Finnerty, Defendants.

Defendants' Bill of Exceptions.

Be it Remembered, that on the first day of December, A. D. 1902, the same being one of the regular juridical days of the December, A. D. 1902 term of said court, this cause came on for trial before the Hon Peter L. Palmer, Judge of the District Court of the Fifth Judicial District of the State of Colorado, and the plaintiff, Alice J. McCombe, appearing by John A. Ewing, her attorney, and the plaintiff, George R. Elder appearing *per se*, his attorney, and the defendants appearing by Charles Cavender, their attorney. Trial by jury being waived by both parties hereto.

Thereupon it was agreed that the replication filed on behalf of George R. Elder, with the exception of paragraph seven thereof, may stand as the replication for Alice J. McCombe.

Whereupon the defendants by their attorney moved that there be considered but one plaintiff, Mr. McCombe.

51 But the Court overruled the motion for the present.

To which ruling of the Court in overruling said motion, defendants, by their attorney, then and there duly excepted.

Whereupon, the plaintiffs, to maintain the issues in their behalf, introduced and offered the following evidence, to-wit:

A. J. HASKIN, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. ELDER:

Q. Where do you reside?
A. Leadville.
Q. What is your profession?
A. Mining engineer.
Q. Will you state if you prepared a map of the conflict against the Comstock?
A. I did prepare the map displayed there (pointing to a map placed on the wall).

Said map is marked "Plaintiffs' Exhibit A" and offered in evidence and attached to this bill of exceptions.

(Here follows diagram marked page 52.)

53 Q. Will you state if that is the map marked "Plaintiffs' Exhibit A"?

A. I copied that from the plats on record in the land office—simply enlarged it.

Q. What are the different areas of the conflict colored there?

A. The total conflicts between the Comstock and the Idaho lode amounts to 2.05 acres, of that portion the Pennsylvania takes off .23 of an acre, leaving the conflict between the Idaho and Comstock, exclusive of its conflict with the Pennsylvania, 1.82 acres. The last area that I mentioned is that in red.

Mr. EWING:

Q. The yellow is what?

A. The conflict between the three lode claims.

Mr. ELDER: I hand the witness the original protest and adverse of the Comstock Lode filed August 19th, 1897, from the files of the land office, and I ask Mr. Haskin if his map is a direct copy of the adverse plat.

Mr. CAVENDER: That is a matter to be proven by the map, and not by the witness.

Mr. ELDER:

Q. Did you make your map from the original adverse?

A. Yes sir.

Q. And from what else?

Mr. CAVENDER: I am willing that certified copies of the land office go in.

Mr. EWING: We can introduce what we want and you can introduce the balance.

Mr. CAVENDER: Defendants object unless introduced in evidence and used by us.

54 The COURT: The objection is sustained.

To which ruling of the court in sustaining said objection, plaintiffs, by their counsel, then and there duly excepted.

Mr. ELDER:

Q. Did you examine the original application for patent of the Comstock?

A. I did, sir.

Q. Is this map a correct portrayal of the area in conflict between the Comstock and the Idaho lodes?

A. To the best of my belief it is.

Mr. ELDER: We offer a certified copy of the location certificate of the Comstock lode, dated the 19th day of February, 1878, recorded February 28th, A. D. 1878, signed R. Morrison, Donald McLean and David Griffin, recorded in Book 10, Page 201, which said location certificate is marked "Plaintiffs' Exhibit B." A copy of which said location certificate is in words and figures as follows, to-wit:

55 PLAINTIFFS' EXHIBIT B.

Book 10, Page 346.

Know all Men by these Presents, That we the undersigned did on the nineteenth day of February, 1878, claim by right of location, fifteen hundred feet linear and horizontal measurement in length, and three hundred feet in width on the Comstock Lode, along the vein thereof, with all its dips, variations and engles, as allowed by law, five hundred and forty four feet of said lode so located, lying and being N. 47 degrees W. of the discovery post on said lode, and 956 feet being S. 47 degrees E. of said post. Said lode being situated in Lake County, Colorado State in California Mining District, the location and bounds of said claim being marked and described more particularly as follows, to-wit: Beginning at corner No. 1, a pine post, on the south side of Evans Gulch, from whence a blazed spruce tree 18 inches diameter bears S. 62 degrees 15 minutes W. 21 feet, and a blazed pine 15 inches diameter bears N. 69 degrees 10 minutes E. 24 feet, and summit of mountain bears N. 58 degrees W. and the discovery post bears S. 36 degrees E. 764 feet, and running thence S. 47 degrees E. 750 feet to stake 1500 feet to corner No. 2, a pine post, being also corner No. 2 of the Robert Burns lode from whence a blazed spruce 12 inches in diameter bears S. 46 degrees E. 7 feet, and summit of mountain north of trail at head of Evans Gulch bears N. 23 degrees 30 minutes E. Thence S. 11 degrees 53 minutes E. 521.5 feet to corner No. 3, a pine post, thence N. 47 degrees W. 750 feet to stake 1500 feet to corner No. 4, a pine post, from whence a blazed pine tree 10 inches diameter bears S. 74 degrees 30 minutes W. 18 feet, and a mountain peak bears S. 88 degrees 30 minutes W. and a blazed spruce 11 inches diameter bears N. 69 degrees 30 min-
56 utes E. 13.4 feet, thence N. 11 degrees 53 minutes W. 521.5 feet to corner No. 1, the beginning.

(Variation in all courses 15 degrees E.)

as witness our hands and seals this 27th day of February, 1878.

(Signed) R. MORRISON.
(Signed) DONALD McLEAN.
(Signed) DAVID GRIFFIN.

Recorded February 28th, A. D. 1878, at 11 A. M.
(Signed) JOS. H. WELLS, *Recorder.*"

Attached to said exhibit "B" is a certification, a copy of which certification is in the words and figures as follows, to-wit:

STATE OF COLORADO, *County of Lake, ss:*

I, Frank Lomeister, Clerk and Recorder in and for said county in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Document No. — as it appears of record in my office, in Book 10, Page 201.

Witness my hand and official seal this — day of Oct. 2, 1902.
F. LOMEISTER,
[SEAL.] *Clerk and Recorder,*
(Signed) By E. W. FRYER, *Deputy.*"

57 Mr. CAVENDER: The defendants object to the introduction of Plaintiffs' Exhibit B" for the reason that it is incompetent and immaterial, and not tending to establish any of the issues in this case.

The COURT: The objection is over-ruled.

To which ruling of the court in over-ruling said objection, defendants by their counsel then and there duly excepted.

Mr. ELDER: We offer a certified copy of a deed from Ronald Morrison to Christian Gude, dated the 18th day of September, 1878, to an undivided one third interest in the Comstock Lode; consideration sixty dollars; acknowledged; recorded September 28th, 1878, in Book E, at Page 489, which said deed was marked "Plaintiffs' Exhibit C."

A copy of said deed is in words and figures as follows, to-wit:

58 PLAINTIFFS' EXHIBIT C.

"This Indenture, Made the 18th day of September in the year of our Lord One Thousand Eight Hundred and seventy-eight between Ronald Morrison of the County of Lake and State of Colorado, part- of the first part and Christian Gude of the County of Lake, State of Colorado, part- of the second part,

Witnesseth, That the said party of the first part for and in consideration of the sum of sixty (*60$*) dollars of the United States of America to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part and to his heirs and assigns one equal undivided one third (⅓) interest in and to the Comstock Lode, ledge or deposit situate in Evans Gulch in California Mining District, Lake Co., Colorado.

The location certificate of which is recorded in Granite, Lake Co., Colorado, in Book ten on page 346.

Together with all dips, spurs and angles and also all the metals, ores, gold and silver bearing quartz rock and earth; and all the rights, privileges and franchises thereto appendant and appurtenant, or therewith usually had and enjoyed; also all and singular the tenements hereditaments and appurtenances thereto belonging, or in anywise appertaining and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession claim and demand whatsoever, as well in law as in equity of the said party of the first part of in or to the said premises, and every part and parcel thereof, with the appurtenances to have and to hold all and *and*
singular the said premises together with the appurtenances
59–61 and privileges thereto incident. unto the said party of the second part his heirs and assigns forever.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

RONALD MORRISON. [SEAL.]"

Signed and sealed in the presence of
W. A. NORTHROP.
DONALD McLEAN.

STATE OF COLORADO, *County of Lake, ss:*

I, W. A. Northrup, in and for said County in the State aforesaid do hereby certify that Ronald Morrison personally known to me to be the person whose name is subscribed the annexed deed appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 18th day of September, A. D. 1878.

W. A. NORTHRUP,
[SEAL.] *Notary Public.*

Recorded Sept. 28, 1878, at 8 o'clock A. M. in Book E page 489.
JOS. H. WELLS, *Recorder.*"

* * * * * * *

62 PLAINTIFFS' EXHIBIT D.

"38286.

This Deed, Made this 5th day of December, in the year of our Lord One Thousand eight hundred and eighty-one between Christina Gude of the County of Lake and State of Colorado, of the first part, and Wilhelmine Gude, of the County of Lake and State of Colorado, of the second part.

Witnesseth, That the said party of the first part, for and in consideration of the sum of Sixty (60) Dollars, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed and quit-claimed, and by these presents does remise, release, sell, convey and quit-claim unto the said party of the second part, her heirs and assigns forever, all the right, title, interest, claim and demand, which the said party of the first part has in and to the following described premises situate, lying and being in the County of Lake and State of Colorado, to-wit: One equal undivided one third (1/3) interest in and to the Comstock Lode ledge or deposit situate in Evans Gulch, in California Mining District Lake Co. Colorado, the location certificate of which is recorded in Granite, Lake Co., Colorado, in Book Ten (10) on page 346.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in any wise thereunto appertaining, and all the estate, right, title, interest and

claim whatsoever, of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns for-
63 & 64 ever.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) CHRISTINA GUDE. [SEAL.]
—— ——. [SEAL.]

Signed, sealed and delivered in presence of
(Signed) W. A. NORTHRUP.

"STATE OF COLORADO, *Lake County, ss:*

I, W. A. Northrup, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Christina Gude personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this 5th day of December, A. D. 1881.

(Signed) W. A. NORTHRUP,
[NOTARIAL SEAL.] *Notary Public.*"

Exhibit D is endorsed as follows: "Certified Copy Document No. 38286. Quit Claim Deed. Christina Gude to Wilhelmine Gude. State of Colorado, Lake County, *ss:* This Quit-claim deed was filed for record at 10 o'clock A. M. Dec. 5, 1881—and duly recorded in Book 54 Page No. 506. (Signed) Jos. H. Wells, Recorder. Fees, $1.15."

* * * * * * *

65 Mr. CAVENDER: The defendants object to the introduction of "Plaintiffs' Exhibit D" for the reason that it is incompetent and immaterial, and not tending to establish any of the issues in this case.

The COURT: The objection is over-ruled.

To which ruling of the court in over-ruling said objection, defendants by their counsel then and there duly excepted.

Mr. ELDER: We now offer in evidence a certified copy of a mining deed, dated the 5th day of April, 1894, from Wilhelmina Gude to Samuel McMillen and John McCombe; consideration One dollar and other good and valuable considerations of a one third part of interest in the Comstock Lode; acknowledged; recorded April 7th, 1894, in Book 148 at Page 422, which said mining deed is marked "Plaintiffs' Exhibit E."

A copy of which said mining deed is in words and figures as follows, to-wit:

66 PLAINTIFFS' EXHIBIT E.

"93068.

This Indenture, Made this fifth day of April, in the year of our Lord one thousand eight hundred and ninety-four, between Wilhelmina Gude of the County of Lake and State of Colorado, party of the first part, and Samuel McMillen and John McCombe, of the County of Lake and State of Colorado, party of the second part,

Witnesseth, That the said party of the first part, for and in consideration of the sum of One dollar and other good and valuable considerations to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release, and forever quit-claim unto the said party of the second part, and to his heirs, and assigns, all the following described mining property to-wit: The equal undivided one-third (1/3) part or interest of in and to the "Comstock" lode or mining claim, situate in California Mining District, Lake County, State of Colorado,

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever,
67 as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns, forever.

In Witness Whereof, The said party of the first part has hereunto set her hand and seal the day and year first above written.

(Signed) MRS. WILHELMINA GUDE. [SEAL.]
——— ———. [SEAL.]

Signed, sealed and delivered in presence of

——— ———.
——— ———.

"STATE OF COLORADO, *Lake County, ss:*

I, H. P. Krell, a Notary Public in and for the said County in the State aforesaid, do hereby certify that Wilhelmina Gude who is personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument of writing as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial seal, this fifth day of April, A. D. 1894.

My Commission expires May 20, 1895.

(Signed) H. P. KRELL,
[NOTARIAL SEAL.] *Notary Public.*

68 "Exhibit C" is endorsed upon the back as follows, to-wit:

"Certified Copy Document No. 93068. Doc. No. 93068. Mining Deed. Wilhelmina Gude to Samuel McMillen and John McCombe. State of Colorado, County of Lake, *ss:* I hereby certify that this Deed was filed for record in my office at 10:10 o'clock A. M. April 7, 1904, and is duly recorded in Book 148, Page No. 422. J. W. Newell, Recorder, (Signed) By H. W. Woodward, Deputy. Fees, $1.25."

Attached to said "Exhibit E" is a certification, a copy of which certification is in words and figures as follows, to-wit:

"STATE OF COLORADO, *County of Lake, ss:*

I, Frank Lomeister, Clerk and Recorder in and for said County, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Document No. 93,068 as it appears of record in my office, in Book 148, Page 422.

Witness my hand and official seal this — day of Oct. 2, 1902.

[SEAL.] F. LOMEISTER,
Clerk and Recorder,

(Signed) By E. W. FRYER,
Deputy."

69 Mr. CAVENDER: The defendants object to the introduction of the mining deed, not to the deed itself, but defendants object to any evidence as to the title of Samuel McMillen, in that he is not a party to this suit; also because it appears from the admissions in the pleadings that prior to this time the legal title of Wilhelmina Gude had passed into C. T. Carnahan and Tingley S. Wood, by virtue of a tax sale.

The COURT: The objection is over-ruled.

To which ruling of the Court in over-ruling said objection, defendants by their counsel then and there duly excepted.

Mr. ELDER: We now offer a mining deed, dated Oct. 19th, 1899, from Samuel McMillen to George R. Elder; consideration $500. and other valuable considerations, of a one twelfth interest in and to the Comstock Lode Mining Claim Survey No. 3613, recorded in Book No. 177, Page 511, which exhibit was marked "Plaintiffs' Exhibit F."

Which said exhibit is in words and figures as follows, to-wit:

70 PLAINTIFFS' EXHIBIT F.

"This Indenture, Made the nineteenth day of October in the year of our Lord one thousand eight hundred and ninety nine, between Samuel McMillen of the City of Leadville of the County of Lake and State of Colorado, party of the first part, and George R. Elder of the City of Leadville of the County of Lake and State of Colorado, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of Five Hundred ($500.) and other valuable considerations —— Dollars, current money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns, an undivided Three Eighths (3/8) interest in and to the Eulalia Lode Mining Claim United States Survey No. 9234, situated lying and being upon Breece Hill in California Mining District, Lake County, State of Colorado, adjoining the Glengary Lode U. S. Sur. No. 716, on the South east, the Little Vinnie Lode U. S. Sur. No. 596, on the East, the Robert Burns Lode U. S. Sur. No. 538, on the North, and the Eclip Lode U. S. Sur. No. 471 on the East and West, containing 3.240 acres of ground, the said Eulalia Lode Mining Claim being located May 30th 1893, the location certificate being recorded upon the 17th day of June, A. D. 1893, among the records of Lake County, Colorado, in Book 84 at Page 550, and to which records reference is hereby made for a more particular and accurate description
71 thereof;

Also an undivided one-twelfth (1/12) interest in and to the Comstock Lode Mining Claim United States Survey No. 3613, situated lying and being upon Breese Hill in California Mining District, Lake County, State of Colorado, adjoining United States Mineral Surveys Nos. 538, 9234, 471 and 802, the said Comstock lode mining claim being duly recorded among the records of Lake County, to which records reference is hereby made for a more particular and accurate description thereof.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To Have and to Hold, All and singular the said premises, together

with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

50¢. Revenue Stamp. S. McM. 10/19/99.
50¢. Revenue Stamp. S. McM. 10/19/99.

In Witness Whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) SAMUEL McMILLEN. [SEAL.]
—— ——. [SEAL.]

Signed, sealed and delivered in presence of
72 (Signed) P. M. WALL.

STATE OF COLORADO, *Lake County, ss:*

I, Philip M. Wall, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Samuel McMillen who is personally known to me to be the person whose name is subscribed to the annexed Deed, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this nineteenth day of October, A. D. 1899.

[NOTARIAL SEAL.] (Signed) PHILIP M. WALL,
Notary Public.

My Commission expires July 12, 1902.

(10¢ Revenue Stamp. P. M. W. 10/19/99.)"

Said Exhibit is endorsed upon the back as follows, to-wit:

"No. 114738. Mining Deed. Samuel McMillen To George R. Elder. State of Colorado, County of Lake, *ss:* I hereby certify that this Deed was filed for record in my office at 4:55 o'clock P. M. Oct. 19th, 1899, and is duly recorded in Book 177, Page No. 511. (Signed) H. S. Phillips, Recorder. (Signed) D. G. Houghton, Deputy. Fees, $1.50."

73 Mr. CAVENDER: Defendants object to the introduction of said exhibit on the ground that it is incompetent and immaterial; also because it is a deed from Samuel McMillen to George R. Elder, McMillen not being a party to this suit, not having filed an adverse suit.

The COURT: The objection is over-ruled.

To which ruling of the court in over-ruling said objection, defendants by their counsel then and there duly excepted.

Mr. ELDER: We now offer in evidence a mining deed, dated October 20th, 1899, between Samuel McMillen of the City of Leadville, and George R. Elder, also of the City of Leadville, consideration $500, for a one twelfth interest in and to the Comstock Lode Mining Claim; recorded in Book 177 at Page 514, which said Exhibit is marked "Plaintiffs' Exhibit G."

A copy of which said exhibit is in words and figures as follows, to-wit:

74 PLAINTIFFS' EXHIBIT G.

"This indenture, Made the twentieth day of October in the year of our Lord one thousand nine hundred and ninety-nine, between Samuel McMillen of the City of Leadville of the County of Lake and State of Colorado, party of the first part, and George R. Elder, of the City of Leadville, of the County of Lake and State of Colorado, party of the second part,

Witnesseth, That the said party of the first part, for and in consideration of the sum of Five Hundred ($500) Dollars, current money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise and release and forever quit-claim, unto the said party of the second part, and to his heirs and assigns.

An undivided three eighths (3/8) interest in and to the Eulalia Lode Mining Claim U. S. Mineral Survey No. 9234, situate, lying and being upon Breece Hill, California Mining District, Lake County, Sate of Colorado, and adjoining U. S. Mineral Surveys Nos. 538, 471, 716 and 3613. The Location Certificate of said Eulalia Lode Mining Claim is recorded in Book 84, Page 550 of the records of Lake County, to which records reference is hereby made for a more particular and accurate description thereof.

Also an undivided one twelfth (1/12) interest in and to the Comstock lode mining claim U. S. Mineral Survey No. 3613, situated, lying and being upon Breece Hill, California Mining District, Lake
75 County, State of Colorado, and adjoining U. S. Mineral Surveys Nos. 538, 471, 802 and 9234. The Location Certificate of the said Comstock lode being recorded in the Recorder's Office of Lake County, to which records reference is hereby made for a more particular and accurate description thereof.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, All and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

(25¢ Revenue Stamp. S. McM. 10/20/99).
(25¢ Revenue Stamp. S. McM. 10/20/99).

In witness whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) SAM'L McMILLEN. [SEAL.]
—— ——. [SEAL.]

Signed, Sealed and Delivered in presence of
—— ——.

76 STATE OF COLORADO, *Lake County, ss:*

I, William H. Nash, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Samuel McMillen, who is personally known to me to be the person whose name is subscribed to the annexed Deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this 20th day of October, A. D. 1899.

(Signed) WILLIAM H. NASH,
[NOTARIAL SEAL.] *Notary Public.*

My Commission expires October 18, 1902."

(10¢ Revenue Stamp. W. H. N. 10/20/99).

"Exhibit G" is endorsed upon the back as follows, to wit:
"No. 114745 Mining Deed. Samuel McMillen To George R. Elder. State of Colorado, County of Lake, *ss:* I hereby certify that this Deed was filed for record in my office at 9:51 o'clock A. M. Oct. 20th, 1899, and is duly recorded in Book 177, Page No. 514. (Signed) H. S. Phillips, Recorder. (Signed) D. G. Houghton, Deputy. Fees, $1.50."

77 Mr. CAVENDER: Defendants object to the introduction of said Exhibit on the ground that it is incompetent and immaterial; also because it is a deed from Samuel McMillen to George R. Elder, McMillen not being a party to the suit, not having filed an adverse suit.

The COURT: The objection is over-ruled.

To which ruling of the court in over-ruling said objection, defendants, by their counsel, then and there duly excepted.

Mr. ELDER: It is understood that should it be desired to go into an accounting, it will be permitted.

Mr. CAVENDER: We wish to ask a dismissal of the suit upon the evidence for the reason that no title has been shown, nor any proof that Alice J. McCombe is the administratrix. We ask judgment to be entered by the court in favor of the defendants.

The COURT: You must prove your title.

Mr. EWING: I will have to telephone to Denver for a certificate of appointment or substitution of Alice J. McCombe as Administratrix.

Mr. CAVENDER: My objection is that Mr. McMillen has not com-

menced an adverse suit. I will admit the appointment of Alice J. McCombe.

Mr. EWING: It is admitted that Alice J. McCombe is the duly appointed administratrix by the County Court of Arapahoe County of the estate of John McCombe, deceased.

Plaintiffs rest.

78 Mr. CAVENDER: I again ask for a dismissal of the case on the ground that Mr. McMillen never filed or commenced an adverse suit within the statutory time required by Section 2324, the rule being that a co-tenant may bring a suit, but McCombe's interest is one sixth, if he has any interest at all. We ask for a judgment for defendants as against Mr. McMillen.

Whereupon, the court took a recess until 2 o'clock P. M. December 1, 1902.

DECEMBER 1, 1902.

Pursuant to adjournment court convened at 2 o'clock P. M. December 1, 1902.

Counsel presented arguments in favor of motion for judgment in favor of McMillen's interest.

The COURT: The motion will be denied.

To which ruling of the court in denying said motion, defendants by their counsel then and there duly excepted.

79 Mr. J. O. HEIMBERGER, consent of counsel being obtained for re-opening plaintiffs' case to identify a book, being first duly sworn, on behalf of plaintiffs, testified as follows:

Mr. ELDER:

Q. What is your name?
A. J. O. Heimberger.
Q. Where do you reside?
A. Leadville, Colorado.
Q. What is your business?
A. Newspaper publishing.
Q. Have you been connected with the Herald Democrat Publishing Company?
A. Leadville Printing Publishing Company.
Q. For how long?
A. Since '89.
Q. Have you in your possession the files of the Leadville Herald Democrat for the last half of the year 1889?
A. These are the files from July to December.
Q. What year?
A. '89.
Q. Have they been in the possession of the Leadville Printing Publishing Company?
A. Yes, sir.
Q. Since you entered their employ?
A. Yes, sir.
Q. Are they now in your custody?

A. Yes, sir.

Q. Are you the owner and proprietor of the Leaville Herald Democrat?

A. Yes, sir.

Plaintiffs rest.

Mr. CAVENDER: The defendants renew the motion for judgment for defendants of one sixth interest as against McMillen.

The COURT: The motion is denied.

To which ruling of the court in denying said motion defendants by their counsel then and there duly excepted.

80 Whereupon the defendants to maintain the issues in their behalf, introduced and offered the following evidence, to-wit:

Mr. CAVENDER: Defendants offer in evidence a treasurer's deed, commonly known as a tax deed, from M. F. Egan, the County Treasurer of the County of Lake, to C. T. Carnahan, of an undivided one third interest in and to the Comstock Lode Mining Claim, No. 3613, executed on the 8th day of August, A. D. 1902; recorded on the 11th day of August, A. D. 1902. Which said exhibit was marked "Defendants' Exhibit 1."

A copy of which said Exhibit is in words and figures as follows, to-wit:

81 DEFENDANTS' EXHIBIT 1.

"Know all men by these presents, that, whereas, the following described real property, viz. An undivided one-third (1/3) interest in and to the Comstock lode mining claim, 3613, 9.67 acres in California Mining District, situated in the County of Lake, and State of Colorado, was subject to taxation for the year A. D. 1888, and whereas, the taxes assessed upon said real property, for the year aforesaid, remained due and unpaid at the date of the sale hereinafter named; and, whereas, the treasurer of the said county did, on the fifth (5th) of August, A. D. 1889, by virtue of the authority vested in him by law at (an adjourned sale) the sale begun and publicly held on the fifth (5th) day of August, A. D. 1889, expose to public sale at the office of the County Treasurer in the County aforesaid, in substantial conformity with the requirements of the statute in such case made and provided, the real property above described, for the payment of taxes, interest and costs then due, and remaining unpaid on said property; and whereas, at the time and place aforesaid, C. T. Carnahan, of the County of Lake, and State of Colorado, having then and there offered to pay the sum of One (1) Dollars and thirty-eight (38) cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, for the whole of the said 1-3 one third interest in said mining claim which was the least quantity bid for, and payment of said sum having been made by him to the said treasurer, the said mining property was stricken off to him at that price; and, whereas, the holder of said certificate has paid subsequent taxes on said property, to the amount of three (3) Dollars, and ninety-

82 two (92) cents; and, whereas, more than three years have elapsed since the date of said sale, and, whereas, no part of

the said 1-3 interest in the said property has been redeemed therefrom as provided by law;

Now, therefore, I, M. F. Egan, Treasurer of the County aforesaid, for and in consideration of the said sum to the treasurer paid, as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said C. T. Carnahan, of Lake County, Colorado, his heirs and assigns, an undivided (⅓) one third interest in and to the Comstock Lode Mining Claim, #3613—9.67 acres situate in California Mining District, Lake County, Colorado, the real property hereinbefore described:

To Have and to Hold, the said one third (⅓) in and to the said Comstock Lode Mining Claim unto C. T. Carnahan, his heirs and assigns forever; subject, however, to all rights of redemption by minors, insane persons, or idiots, provided by law.

In Witness Whereof, I, M. F. Egan, Treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto set my hand and seal this 8th day of August, A. D. 1892.

[SEAL.] (Signed) M. F. EGAN,
Treasurer.

"STATE OF COLORADO, *County of Lake, ss:*

I hereby certify that before me W. J. Bayard, a Notary Public in and for said County, personally appeared M. F. Egan, Treas-
83 urer of said County, personally known to me to be the Treasurer of said County, at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to, and who executed the above conveyance as Treasurer of said county, and who acknowledged the execution of the same to be his voluntary act and deed as Treasurer of said County, for the purposes therein expressed.

Given under my hand and Notarial Seal, this 8th day of August, A. D. 1892.

(Signed) W. J. BAYARD,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires Dec. 31, 1894."

Exhibit "1" is endorsed as follows:

"Comstock 3613. 1/3. No. 87912. Treasurer's Deed from M. F. Egan, County Treasurer, to State of Colorado, County of Lake, *ss:* I hereby certify that this Deed was filed for record, in my office, at 12 o'clock M. Aug. 11, 1892, and is duly recorded in Book 52, Page 6. (Signed) C. H. S. Whipple, Clerk and Recorder. By —— ——, Deputy. Fees, $1.75 pd."

84 Mr. EWING: As to the defendant McCombe, we desire to make the formal objection that the validity of this deed is denied in the *the* pleadings, and it becomes incumbent upon the party offering it to prove the necessary steps taken in making the deed before it is offered as evidence.

The COURT: The objection is overruled.

To which ruling of the court in overruling said objection the plaintiff, McCombe, by her attorney then and there duly excepted.

Mr. ELDER: On behalf of the plaintiff, George R. Elder, we object to the introduction of the tax deed of August 8th, A. D. 1902.

First: Because it appears upon its face that it contains an area of 9.67 acres, and a part of this area, 1.80 acres, was cancelled by letter of the Honorable Commissioner of the Land Office, dated May 2nd, 1887, which cancellation still remains in force and effect to this date, December 1, 1902, and under the laws of this state that portion of 1.80 acres was not taxable for the year 1888, nor could it be sold in the year 1889, and the deed is, therefore, void and can pass no title against these plaintiffs.

Second: That, including as it does the ground for which no receiver's Receipt is issued, the assessment and taxation thereof was void, and the sale was void because illegal taxes were blended in the consideration expressed of one dollar and thirty-eight cents.

Third: That the subsequent cancellation of the whole claim by letter of the commissioner, dated December 12th, 1894, cancelled the entire entry made December 31st, 1884, and the property
85 was not subject to taxation from May 2d, 1887, to and until December 12th, 1894, and neither the assessor nor the county treasurer of Lake County had the power to assess the same.

Fourth: The assessment and sale of the Comstock lode was void and without jurisdiction in the officers, as the title to the land remained in the United States and was not taxable by the State of Colorado or the County of Lake, and the equitable title was not fully vested in the plaintiff's grantors and there remained something to be done to establish the right of plaintiff's grantors.

Fifth: Said property was not taxable during the period of cancellation.

Sixth: An ejectment suit is now pending against the Comstock lode by the Collins Lode for 1.82 acres of the total area claimed in the 9.65 acres of this deed, in the District Court of Lake County, and the title for taxable purposes has not yet passed to the plaintiffs or their grantors.

Seventh: The entire tax sale for the year 1889 for delinquent taxes for the year 1888, has been declared void and invalid for the reason that the notice of tax sale was published exclusively in the Sunday Edition of the Herald-Democrat, and this adjudication was made by the Supreme Court of Colorado in the case of Schwed *vs.* Hartwitz, 23 Colo., 187, and this deed based upon such void notice is absolutely void, as no such sale took place.

The COURT: The objection is overruled.

To which ruling of the court in over-ruling said objections the plaintiff Elder, by his counsel, then and there duly excepted.

Mr. CAVENDER: The defendants offer in evidence a certified copy of a quit-claim deed, dated the 31st day of October, A. D.
86 1893, from Charles T. Carnahan to Tingley S. Wood, for a number of properties including the Comstock Lode No. 3613,

duly acknowledged and recorded May 29th, 1895, which said deed was marked "Defendants' Exhibit No. 2."

A copy of which said exhibit is in words and figures as follows, to-wit:

87 DEFENDANTS' EXHIBIT No. 2.

"98345.

This Deed, Made this 31st day of October, in the year of our Lord One thousand eight hundred and ninety-three between Chas. T. Carnahan of the County of Lake and State of Colorado, of the first part, and Tingley S. Wood, of the County of Lake, and State of Colorado, of the second part.

Witnesseth, That the said party of the first part, for and in consideration of the sum of one dollar and other good and valuable considerations to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed and quit-claimed, and by these presents does remise, release, sell, convey and quit-claim unto the said party of the second part his heirs and assigns forever, all the right, title, interest, claim and demand, which the said party of the first part has in and to the following described mining claims situate, lying and being in the County of Lake and State of Colorado, to-wit: The "Burkey, 3913," "Boulder, 4083," "Edith Tangent, 3437," "Katie, 3969," "Laura 3439," "Little Hugh" 3994," "Orange Blossom 3951," "Sunnyside 585," "Wasicakin 4111," "Alma Mater 2565," "Comstock 3613," "Charlie B. 2291," "Congo 507," "Dania 506," "Del Monte 530," "Emma 626," "Harry Colvin 629," "Islipeming 1018," "Jessie 709," "Leonard 2894," "Leopard 801," "Logan 730," "Magenta 2895," "Maggie 1144," "Mammoth Placer 2817," "Ottawa 2619," "Pocahontas 578," "Rothschild 946," "Silver Basin 923," "Silver Cloud 1016," "Stark County 4315," all in *California* Mining District, also the "Dick Turpin 4598," in Lacawanna Mining District.

88 To have and to hold the same, together with all, and singular the appurtenances and privileges thereunto belonging, or in any wise thereunto appertaining, and all the estate, right, title, interest and claim whatsoever, of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) C. T. CARNAHAN. [SEAL.]
—— ——. [SEAL.]

Signed, sealed and delivered in presence of
—— ——.

"STATE OF COLORADO, *County of Lake, ss:*

I, Wm. E. Hugo, a Notary Public in and for said County, in the state aforesaid, do hereby certify that C. T. Carnahan, who is per-

sonally known to me to be the person whose name is subscribed to the foregoing Deed, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this 8th day of November, A. D. 1893.

(Signed) WM. ELIOT HUGO,
Notary Public.

My Commission expires November 19, 1893."

89 Said exhibit is endorsed upon the back as follows:

"Certified Copy Document No. 98345. Quit Claim Deed. C. T. Carnahan to Tingley S. Wood. State of Colorado, County of Lake, *ss:* I hereby certify that this Deed was filed for record at 1:50 o'clock P. M. May 29, 1895, and duly recorded in Book 158, Page No. 174. J. W. Newell, Recorder. (Signed) By R. O. North, Deputy. Fees, $1.15."

Attached to said exhibit is a certification, a copy of which certification is in words and figures as follows, to-wit:

"STATE OF COLORADO, *County of Lake, ss:*

I, Frank Lomeister, Clerk and Recorder in and for said County, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Document No. 98345 as it appears of record in my office, in Book 158, Page 174.

Witness my hand and official seal this — day of Nov. 29, 1902.

(Signed) F. LOMEISTER,
[SEAL.] *Clerk and Recorder,*
(Signed) By E. W. FRYER, *Deputy.*"

90 Mr. EWING: The defendant McCombe, administratrix, desires to enter a formal objection to the "Defendants' Exhibit 2" for the reason that the same is based upon the alleged title claimed by defendant under the alleged title acquired by Carnahan through a deed marked "Exhibit I"; because this has been denied, it is not competent until all the steps have been taken.

Mr. ELDER: We further object for the same reasons that we objected to the original deed.

The COURT: The objections are over-ruled.

To which ruling of the court in over-ruling said objections the plaintiffs by their counsel then and there duly excepted.

Mr. CAVENDER: We desire to offer a certified copy of an affidavit of annual labor by Patrick Burns on the Comstock Lode property, for the year ending December 31st, 1895, at the expense of T. S. Wood; filed December 31st, 1895. Which said affidavit of labor is marked "Defendants' Exhibit 3."

A copy of which said exhibit is in words and figures as follows, to-wit:

DEFENDANTS' EXHIBIT 3.

"101,028.

STATE OF COLORADO, *Lake County, ss:*

Before me, the subscriber, personally appeared Patrick Burns, who being duly sworn, saith that at least one hundred dollars' worth of work or improvements were performed or made during the year ending December 31st, 1895, upon the Comstock lode mining
91 claim, U. S. Survey 3613, situate upon Breece Hill in California Mining District, County of Lake, State of Colorado. Such expenditure was made by or at the expense of T. S. Wood, one of the owners of said claim, for the purpose of complying with the law and holding said claim.

Subscribed and sworn to before me this 31st day of December, A. D. 1895.

[SEAL.] (Signed) PATRICK BURNS.

(Signed) FRANK W. McQUISTON,
Notary Public.

My Commission expires Oct. 1, 1898."

Said Exhibit is endorsed upon the back as follows, to-wit:

"Certified Copy Document No. 101028. Affidavit of Labor and Improvements. Comstock 3613. State of Colorado, Lake County, *ss:* Filed for record this 31st day of Dec. 1895, at 12 o'clock M. Recorded in Book 75 Page 270. (Signed) J. W. Newell, Recorder, (Signed) R. O. North, Deputy. Fees 50¢."

Attached to said exhibit is a certification, a copy of which certification is in words and figures as follows, to-wit:

"STATE OF COLORADO, *County of Lake, ss:*

I, Frank Lomeister, Clerk and Recorder in and for said County, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Document No. 101028 as it appears of record in my office, in Book 75, Page 270.

Witness my hand and official seal this 29 day of Nov., 1902.

[SEAL.] F. LOMEISTER,
Clerk and Recorder,

(Signed) By F. W. FRYER,
Deputy."

92 MR. EWING: We desire to object to the exhibit for the reason that if the defendant has any title at all, it is acquired through a tax deed, and there can be no necessity for the affidavit, and it is immaterial.

The COURT: Annual labor for what year?

Mr. CAVENDER: 1895.

The COURT: The objection is over-ruled.

To which ruling of the court in over-ruling said objection the plaintiffs, by their attorneys, then and there duly excepted.

Mr. CAVENDER: The defendants desire to offer in evidence proof of publication of notice of forfeiture of the labor done in 1895, the notice of forfeiture signed by T. S. Wood, being addressed to the heirs of P. Finnerty, deceased, and to all others whom it may concern, which proof of publication is marked "Defendants' Exhibit 4."

A copy of which said exhibit is in words and figures as follows, to-wit:

93 DEFENDANTS' EXHIBIT "4."

"Proof of Publication.

STATE OF COLORADO, *County of Lake, ss:*

W. H. Griffith, being first duly sworn, deposes and says: That he is the Manager of The Leadville Publishing and Printing Co., proprietor of The Evening Chronicle, a daily newspaper published at Leadville, in Lake County, in the State of Colorado, that the notice of Forfeiture, Comstock Lode, of which a copy is hereto attached, was first published in said newspaper, in its issue dated the tenth day of February, 1896, and was published in each issue of said newspaper for ninety two consecutive days thereafter, the last publication thereof being in the issue dated the twelfth day of May, 1896.

[SEAL.] (Signed) W. H. GRIFFITH.

Subscribed and sworn to before me, this third day of August, A. D. 1896.

(Signed) MILLARD C. YOTHERS,
[SEAL.] *Notary Public."*

"Proof of Publication. Filed in ——, Colorado, ——, A. D. 189-. —— ——."

94 Attached to said proof of publication is a notice of forfeiture, which is in words and figures as follows, to-wit:

"Notice of Forfeiture.

To the Estate and Heirs of P. Finnerty, Deceased, and to All Others Whom It May Concern:

You are hereby notified that I have expended during the year 1895 one hundred dollars in labor and improvements upon the Comstock lode mining claim, U. S. Survey No. 3613, situate in California Mining District, Lake County, Colorado, for the purpose of holding said claim under provisions of the statutes of the United States concerning annual labor upon mining claims, being the amount required to hold said lode for the year 1895. If within ninety (90)

days after the publication hereof you fail or refuse to contribute your proportion of such expenditure as co-owners, your interest in said lode claim will become the property of the subscriber, your co-owner, who has made the required expenditure. This notice is published for the purpose of recovering from you the proportionate amount due from you respectively, or in the event of your failure to pay same, within the legal period, to make a forfeiture of your respective interests to the undersigned as provided by law.

T. S. WOOD.

Leadville, Colo., Feb. 10th, 1896.

(First in Feb. 10, last May 11)."

95–105 Mr. EWING: I am not going to make any objection as to the competency of the kind of proof; in other words, whether or not this would be evidence in court, but desire to object to it for the same reason that the defendant McCombe objected to "Exhibit 3," as immaterial.

Mr. ELDER: It does not come under the statutes of the United States.

The COURT: The objection is over-ruled.

To which ruling of the court in over-ruling said objection plaintiffs by their counsel then and there duly excepted.

Mr. CAVENDER: The defendants desire to offer in evidence a certified copy of the location certificate by John McCombe and Ronald Morrison upon the Non Assessable Lode, made January 2, 1895. Which location certificate is marked "Defendants' Exhibit 5."

A copy of which said location certificate is in words and figures as follows, to-wit:

* * * * * * *

106–109 Mr. ELDER: Plaintiffs move for judgment for the reason that the defendant has not proved that the property in suit is taxable under the laws of the State of Colorado, and that in order that the defendant may recover, he should prove the title has passed out of the government of the United States, and that the defendant has failed to introduce evidence to the point that the title has passed out of the United States, and is subject to taxation by the State of Colorado, and for that reason the deed introduced in evidence should be thrown out.

The COURT: The objection and motion is overruled.

To which ruling of the court, in over-ruling said objection and motion, the plaintiffs by their counsel then and there duly excepted.

Mr. CAVENDER: We desire furthermore to offer in evidence the map marked "Defendants' Exhibit 6."

* * * * * * *

110 PLAINTIFFS' EXHIBIT H.

N. 4-219. H. G. P.

W. P. W. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September* 26, 1902.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, consisting of two pages, of a letter of this office dated May 2, 1887, addressed to the Register and Receiver at Leadville, Colorado, in the case of Leadville, Colorado, Mineral Entry No. 2411, by Peter Finerty *et al.* for the Comstock lode mining claim, is a true and literal exemplification of the record of said letter on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

[Seal U. S. General Land Office.]

(Signed) BINGER HERMANN,
Commissioner of the General Land Office.

111 Refer in reply to this initial: N.

DEPARTMENT OF THE INTERIOR, W. M. W.
GENERAL LAND OFFICE, W. O. C.
WASHINGTON, D. C., *May* 2*d*, 1887.

Register & Receiver, Leadville, Colorado.

GENTLEMEN: The papers in the matter of mineral entry No. 2411, made Dec. 31, 1884, by Peter Finerty *et al.* upon the Comstock lode claim, Sur. No. 3613, have been examined.

The record shows that said claim as surveyed, conflicts with Sur. No. 667, the "Idaho" lode to the extent of 2.05 acres. That 1.8 acres of said conflict, exclusive of the conflict between Sur. 718 and said "Idaho" lode, were expressly excluded from the application for patent for said "Comstock" lode, yet the ground embraced in said conflict is included in the entry. There is no law by which I am authorized to issue patent for the entry as it now stands. Therefore, said entry is hereby held for cancellation to the extent of 1.8 acres, the portion of said conflict which was excluded from the application for patent.

The improvements certified to by the Surveyor General as amounting to $500, consist of a shaft 350 ft. deep with shaft-house and a discovery shaft 11 ft. deep. The approved plat of survey shows that all said improvements, except the Discovery Shaft, are placed upon the ground embraced in the conflict above referred to which was excluded from the application for patent. If the necessary improvements have been placed upon the ground embraced in the
112 application for patent, & properly entered an additional certificate from the Surveyor-General should be furnished show-

ing the location and value of each of such improvements as have been so placed upon or made for the development of the ground applied for, and when such improvements were made.

You will notify the claimants hereof, allow the usual time for appeal & at the expiration thereof report as required by circular "A" approved Dec. 18" 1885 & promptly forward ail additional evidence submitted.

Very respectfully, S. M. STOCKSLAGER,
Asst. Commissioner."

113 Mr. CAVENDER: Defendants desire to object to "Plaintiffs' Exhibit H," for the reason that — is a communication between two officers of the government, and is not binding upon the parties hereto, either by law, or practice; that as a matter of fact, before a communication can have any force or effect, as against an owner or protestant of any claim, it must, by the rules of the department, and by the letter itself, be served upon the parties: and it does not appear from this letter that any service was ever had upon the party. It is simply a notice to them that unless they are heard from it will be held for a cancellation, and that they shall have time for appeal. It is simply a private communication, not a decree as between the government and the parties—notice from one government agent to another of what the intention of the government is to do under certain conditions and the parties shall be noticed as to that.

The COURT: The objection is overruled.

To which ruling of the court, in over-ruling said objection, defendants by their counsel then and there duly excepted.

Mr. ELDER: We offer in evidence a certified copy of a letter of the Commissioner of the General Land Office, dated December 12, 1894, Department of the Interior, General Land Office, Washington, D. C. (reading letter). Which letter is marked "Plaintiffs' Exhibit I."

A copy of which said "Plaintiffs' Exhibit I" is in words and figures as follows, to-wit:

114 PLAINTIFFS' EXHIBIT I.

"N. 4–219. H. G. P.

W. P. W. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September* 26, 1902.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, consisting of one page, of a letter of this office dated December 12, 1894, addressed to the Register and Receiver at Leadville, Colorado, in the case of Leadville, Colorado, Mineral Entry No. 2411, by Peter Finerty *et al.* for the Comstock lode mining claim is a true and literal exemplification of the record of said letter on file in this office.

In testimony whereof I have hereunto subscribed my name, and

caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

[Seal U. S. General Land Office.]

(Signed) BINGER HERMANN,
Commissioner of the General Land Office.

115 119,281–1894.

Refer in reply to these initials, viz: N., C. E. T.
Address only the Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR, C. C. H. W. O. C.
GENERAL LAND OFFICE, J. V. W. J. E. W.
WASHINGTON, D. C., *December* 12, 1894.

Register and Receiver, Leadville, Colorado.

SIRS: By office letter N. of August 7, 1894, mineral entry No. 2411 made December 31, 1884, by Peter Finerty *et al.*, upon the Comstock lode, was held for cancellation because of failure to furnish satisfactory evidence of improvement, also evidence as to disposition of suit on adverse claim.

I am now in receipt of your letter of November 13, 1894, inclosing proof of service, and reporting no action taken by the parties in interest. The time for appeal having expired, said mineral entry No. 2411 is hereby canceled.

Make the proper notes on your records and advise the parties.

Very respectfully, S. W. LAMOREUX,
Commissioner."

116 Mr. CAVENDER: To which "Plaintiffs' Exhibit I" we object, unless it is accompanied by a copy of a letter by the officers here to the land office, showing date of the service, or it be admitted when the service was made.

The COURT: The objection is over-ruled.

To which ruling of the court in over-ruling said objection, defendants by their counsel then and there duly excepted.

Mr. ELDER: The plaintiffs offer in evidence the files of the Herald Democrat, containing the publication of the tax notice of the year 1889, for the delinquent taxes of 1888, showing the publication of the delinquent tax sales, only in the Sunday issue of the Herald Democrat, commencing Sunday July 7th, first issue; also Sunday, July 14th, 1889; also Sunday July 21st, 1889; also Sunday July 28th, 1889. We offer this for the purpose of proving that the advertisements under which this sale was made, under which they claim the deed marked "Exhibit No. 1" as introduced by defendants were all made upon Sunday under the words, "The Comstock No. 3613; 9.67 acres, California Mining District; valuation $100.00; taxes $3.32."

Mr. CAVENDER: To which the defendants object as incompetent, irrelevant, and immaterial, and barred by the statutes of the State of Colorado; a suit for the possession of this porperty having not

been commenced within five years from the recording of the treasurer's tax deed and being very irregular and if there is any irregularity in the advertisement it is the very irregularity which is barred by the statute.

The COURT: The objection is overruled.

117 To which ruling of the Court, in over-ruling said objection, defendants by their counsel then and there duly excepted.

Mr. F. LOMEISTER, a witness called on behalf of the plaintiffs in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Lomeister, what is your official position?
A. County Clerk of Lake County, Colorado.
Q. Have you the custody of the files of the County of Lake?
A. Yes sir.
Q. So far as they pertain to the office of Clerk and Recorder of Lake County?
A. Yes sir.
Q. Have you in your possession the proof of publication of the advertised tax notice of the year 1889, for the delinquent taxes of 1888?
A. Yes sir.
Q. Will you produce the same?
A. Produces the records of the Clerk and Recorder's office.)

Mr. ELDER: (Reads from the records as follows:)

STATE OF COLORADO, *County of Lake, ss:*

P. S. Keefer, being first duly sworn, on his oath deposes and says: That he is, and during the months of July and August, A. D. 1889, he was the deputy County Treasurer of the County of

118 Lake, in the State of Colorado, and that as such deputy treasurer, he did on the 8th day of July, A. D. 1889, post at the outer door of the county treasurer's office in the City of Leadville, County of Lake and State of Colorado, the delinquent tax list and notice of sale for the unpaid taxes of 1888, being the same notice as published in The Herald Democrat, a daily newspaper published in Leadville, in the said County of Lake and State of Colorado.

A copy of which notice so posted, as aforesaid, is hereto attached and made a part of this affidavit. Affiant further says that the said delinquent tax list and notice of sale remained so posted until the 8th day of August, A. D. 1889, viz., for a period of four weeks before the tax sale, pursuant to said notice which commenced on the 5th day of August, A. D. 1889, at 10 o'clock A. M."

The heading of the paper is entitled "Sunday, July 7, 1889. The Daily Herald Democrat, Leadville." In the second column of the fourth page occurs the words: "The Comstock No. 3613, 9.67 acres, Mining District of California, valuation $100, taxes $3.32." We offer this in evidence, showing the advertisements upon Sunday.

Mr. CAVENDER: To which offer of plaintiffs, defendants object for the same reasons as last given.

The COURT: The objection is over-ruled.

To which ruling of the court, in over-ruling said objection, the defendants by their counsel then and there duly excepted.

Mr. ELDER: We offer in evidence as "Plaintiffs' Exhibit J" a certified copy of the Abstract of Assessment Roll, of Lake County,
119 Colorado, for the year 1888, showing upon Page 99 The Comstock No. 3613, acres 9.67; value $100; Mining District California; total value $100; total taxes $3.32. The Finnerty estate paid ⅔ interest; value $67.; certified by the treasurer. We offer this copy to show that the assessor of Lake County assessed the Comstock Lode for a total area of 9.67 acres, a total value of $100, a ratable valuation of $10 per acre, showing in connection with the cancellation of the receiver's receipt of the 31st of December, 1884, an incorporation and blending with the illegal taxes upon $20 valuation for the year 1888. Which said certified Abstract of Assessment Roll is marked "Plaintiffs' Exhibit J."

A copy of which said "Exhibit J" is in words and figures as follows, to-wit:

(Here follows Plaintiffs' Exhibit J, marked p. 120.)

Plaintiffs Exhibit J.

ABST

Deedule No.	School District No.					Sec	Tw
1		Fmerly Estate of Wm Val		67⁰⁰	Comstock #3613		
2							
3							
4							

=64=

60

TRACT OF ASSESSMENT ROLL.

Township	Range	Acres	Value of Lands Dollars	Value of Lands and Improvements Dollars	City and Town Property Lots	Block	Addition	Value of Improvements Dollars	Mining Property Mining District	Acres	Value of Dollars	Improvements Dollars	Fruit Trees Dollars	Total Value Dollars	
		9.67		100.					Gila					100	1.
															2.
															3.
															4.

LAKE COUNTY, COLORADO. 190

City of Leadville Valuation Dollars	Dist. No. 1. Valuation Dollars	Dist. No. 2 & c Valuation Dollars	Dist. No. 4. Valuation Dollars	Dist. No. 5 Valuation Dollars	Dist. No. 6. Valuation Dollars	Dist. No. 8. Valuation Dollars	Dist. No. 9. Valuation Dollars	Dist. No. 10. Valuation Dollars	Dist. No. 11. Valuation Dollars	Dist. No. 12. Valuation Dollars	Dist. No. 13. Valuation Dollars

COUNTY. COLORADO. ~~1901~~ 1888.

Dist. No. 6. Valuation Dollars	Dist. No. 8. Valuation Dollars	Dist. No. 9. Valuation Dollars	Dist. No. 10. Valuation Dollars	Dist. No. 11. Valuation Dollars	Dist. No. 12. Valuation Dollars	Dist. No. 13. Valuation Dollars	County Poll Tax Dollars	State Poll Tax Dollars	School District	Rate in Mills	District Tax Dollars	Cts	Total Tax Dollars	Cts	Remarks
													3	32	1.
															2
															3
															4

121–149 Attached to "Plaintiffs' Exhibit J" is a certification by the County Treasurer, which certification is in words and figures as follows, to-wit:

STATE OF COLORADO, *County of Lake, ss:*

I, Joseph A. Lamping, County Treasurer in and for said county, in the state aforesaid, do hereby certify that the within and foregoing is a true, full and correct copy of the Tax Assessment Roll of the Comstock Lode United States survey No. 3613 for the year 1888 as it appears of record in my office, in Book Unknown, 1888, Page 99, and all entries relating to the same made in said book for the year 1888.

Witness my hand and official seal this 28th day of November, 1902.

[SEAL.] J. A. LAMPING,
County Treasurer.

(Signed) By D. C. HOUGHTON, *Deputy.*

* * * * * * *

150 Mr. ELDER: We offer in evidence a certified copy of a tax sale certificate of purchase No. 1033, issued August 7th, 1889, showing a sale of 9.67 acres a third interest in the Comstock Lode No. 3613. Which said tax sale certificate was marked "Plaintiffs' Exhibit X."

A copy of which "Plaintiffs' Exhibit X" is in words and figures as follows, to-wit:

PLAINTIFFS' EXHIBIT "X."

Tax Sale Certificate of Purchase, Colorado.

Treasurer's Office.

Certificate No. 1033.

STATE OF COLORADO, *County of Lake, ss:*

I hereby certify, that at a sale of Real Estate situate in the County of Lake, State of Colorado, for delinquent taxes for the year 1888 at the County Treasurer's Office, in the County aforesaid, on the fifth day of August 1889 in accordance with law C. T. Carnahan was the purchaser of that part of the tract hereinafter described as having been sold, for which he paid the respective sum of money set opposite said tract being the amount of taxes, interest and cost on the whole of said estate, to wit:

Name of owner or to whom assessed.	Description of property taxed.				Part sold.			Am't taxes, int., and costs paid.		Am't subseq'nt taxes paid.		Date of payment.			Am't subseq'nt taxes paid.		Date of payment.			Am't subseq'nt taxes paid.		Date of payment.		
	Part of section or lot.	Sec. or block.	Township, town, or city.	Range, div., or addition.	No. of acres.	Description.	No. of acres.					Month.	Day.	Year.			Month.	Day.	Year.			Month.	Day.	Year.
								Dolls.	*Cts.*	*Dolls.*	*Cts.*				*Dolls.*	*Cts.*				*Dolls*	*Cts.*			
Unknown	Comstock	No. 3613	.....	.....	9.67	1/5 interest.	9.67	1	.38	1	.04	Feb.	29	1890	1	.25	Feb.	28	1891	1	.63	Jan'y	30	1892

1.63
1.25
1.04
3.92

[Seal of Treasurer of Lake Co.]

In witness whereof, I have hereunto set my hand and seal this seventh day of August A. D. 1889.

(Signed) AMOS HENDERSON, [SEAL.]
County Treasurer,

By —— ——, *Deputy.*

K.

152 "Exhibit X" is endorsed upon the back as follows, to-wit: "No. 1033. Tax Sale Certificate of Purchase. Amos Henderson, County Treasurer, to C. T. Carnahan. Issued August 7, 1889. For value received, I hereby assign the within certificate, and all my right, title and interest to the property therein described to —— —— —— 190–. This certificate surrendered and $— redemption money paid to —— —— —— 190–. —— —— County Treasurer. This certificate surrendered and deed made to C. T. Carnahan Aug. 8, 1892. (Signed) M. F. Egan County Treasurer, by (Signed) W. J. Bayard, Dep'y."

Attached to "Exhibit X" is a certification, a copy of which said certification is in words and figures as follows, to-wit:

153 STATE OF COLORADO, *County of Lake, ss:*

I, Joseph A. Lamping, County Treasurer in and for said County, in the State aforesaid, do hereby certify that the within and foregoing is a true, full and correct copy of Tax Sale Certificate of Purchase No. 1033 for a one third interest of the Comstock Lode U. S. Sur. No. 3613.

Dated Aug. 7, 1899, as the same appears on file in my office.

Witness my hand and official seal this 28th day of November, 1902.

[Seal of Treasurer of Lake County.]

(Signed) J. A. LAMPING,
County Treasurer,

(Signed) By D. G. HOUGHTON,
Deputy."

Mr. CAVENDER: Defendants object to Ex. X for the same reasons above stated, and for the reason that the deed is fatal.

The COURT: The objection is over-ruled.

To which ruling of the court, in over-ruling said objections, defendants by their counsel then and there duly excepted.

Mr. ELDER: We now offer in evidence a certified copy of certificate No. 4280—tax sale certificate of purchase, issued by Joseph
154 F. Horner, County Treasurer, dated October 3d, 1895, showing the tax sale of one third interest of the Comstock No. 3613, containing 9.67 acres, for the sum of $3.63, in the name of A. V. Hunter and T. S. Wood. We offer this for the purpose of disputing the claim of title on the part of defendant that he paid the taxes for five years from the 11th day of August, A. D. 1892. Which certificate is marked "Plaintiffs' Exhibit Y."

A copy of which said "Plaintiffs' Exhibit Y" is in words and figures as follows, to-wit:

155

PLAINTIFFS' EXHIBIT "Y."

Tax Sale Certificate of Purchase, Colorado.

Treasurer's Office.

Certificate No. 4280.

STATE OF COLORADO, *County of Lake, ss:*

I hereby certify, That at a sale of Real Estate situate in the County of Lake, State of Colorado, for delinquent taxes for the year 1894 at the County Treasurer's Office, in the County aforesaid, on the 1 day of October 1895 in accordance with law, A. V. Hunter & T. S. Wood *was* the purchaser- of that part of the tract hereinafter described as having been sold, for which *he* paid the respective sum of money set opposite said tract being the amount of taxes, interest and costs on the whole of said estate, to-wit:

Name of owner or to whom assessed.	Description of property taxed.				Part sold.			Am't taxes, int., and costs paid.	Am't subseq'nt taxes paid.	Date of payment.			Am't subseq'nt taxes paid.	Date of payment.			Am't subseq'nt taxes paid.	Date of payment.		
	Part of section or lot.	Sec. or block.	Township, town, or city.	Range, div., or addition.	No. of acres.	Description.	No. of acres.			Month.	Day.	Year.		Month.	Day.	Year.		Month.	Day.	Year.
								Dolls. *Cts.*	*Dolls.* *Cts.*				*Dolls.* *Cts.*				*Dolls.* *Cts.*			
Unknown.....	Comstock..	No. 3613	.....	.....	9.67	⅓ interest	9.67	3 63	3 15	Feb.	29	1896	2 95	Feb.	27	1897				

[Seal of Treasurer of Lake County.]

In witness whereof, I have hereunto set my hand and seal this third day of October A. D. 1895.

(Signed) JOSEPH F. HORNER, [SEAL.]
County Treasurer,

(Signed) By P. S. KEEFER, *Deputy.*

156 "Exhibit Y" is endorsed upon the back as follows, to-wit:
"No. 4280. Tax Sale Certificate of Purchase. Joseph F. Horner, County Treasurer, to A. V. Hunter & T. S. Wood. Issued Oct. 3, 1895. For value received I hereby assign the within certificate, and all my right, title and interest to the property therein described, to —— ——. ——, 189–. This certificate is surrendered and $12.60 redemption money paid to A. V. Hunter & T. S. Wood, Feb'y 9th, 1898. (Signed) George W. Whyte, County Treasurer. This certificate surrendered and Deed made to —— ——. ——, 190–. —— ——, County Treasurer.

Attached to "Exhibit Y" is a certification, a copy of which said certification is in words and figures as follows, to-wit:

157 "STATE OF COLORADO, *County of Lake, ss:*

I, J. A. Lamping, County Treasurer in and for said County, in the State aforesaid, do hereby certify that the within and foregoing is a true, full and correct copy of Tax Sale Certificate of Purchase No. 4280 for One third interest of the Comstock Lode U. S. Sur. No. 3613, dated October 3rd, 1895, as the same appears on file in my office.

Witness my hand and official seal, this 28th day of November, 1902.

[Seal of Treasurer of Lake County.]

(Signed) J. A. LAMPING,
County Treasurer,
(Signed) By D. G. HOUGHTON, *Deputy.*"

Mr. CAVENDER: The defendants object to "Plaintiffs' Exhibit Y" for the reasons above stated.

The COURT: The objection is over-ruled.

To which ruling of the court, in over-ruling said objection, defendants by their counsel then and there duly excepted.

Mr. EWING: I am willing to agree on the behalf of Mrs. McCombe that the taxes were paid in 1893 by Mr. Carnahan; sold in 1894 and redeemed; sold in 1895 for the taxes of 1894, and redeemed by Mr. Wood, and that the taxes were then paid in 1897 by Mr.
158 Wood, and I want to object to it appearing that the taxes were paid in 1891 and 1892 as incompetent and immaterial, unless it is a fact. If it is a fact, it may be done under our objection, as it is incompetent.

Mr. ELDER: And that the property was not legally taxable at the time.

The COURT: The objection is over-ruled.

To which ruling of the court, in over-ruling said objection, plaintiffs by their counsel then and there duly excepted.

Mr. ELDER: We offer in evidence a certified copy of the proof of publication of application for patent for the Comstock Lode, for the purpose of showing that the advertisement of the application for

patent showed an area of 7.88 acres. Which said paper is marked "Plaintiffs' Exhibit Z."

A copy of which said "Plaintiffs' Exhibit Z" is in words and figures as follows, to-wit:

159 PLAINTIFFS' EXHIBIT "Z."

N. 4–219. H. G. P.
W. P. W.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September* 26, 1902.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, pages 1 to 3, of Proof of Publication of the Application for Patent for the Comstock Mine, in case of Leadville, Colorado, Mineral Entry No. 2411, is a true and literal exemplification of said paper on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

[Seal U. S. General Land Office.]

BINGER HERMANN,
Commissioner of the General Land Office.

160 *Proof of Publication.*

STATE OF COLORADO, *County of Lake, ss:*

C. C. Davis, being first duly sworn, deposes and says that he is one of the proprietors of the Leadville Democrat a newspaper published at Leadville, in Lake County, in the State of Colorado; that the Notice of the Application for a Patent for the Comstock Lode Mining Claim, of which a copy is hereto attached, was first published in said newspaper, in its issue dated the 29th day of October 1884, and was published in daily issue of said newspaper for sixty-one consecutive days thereafter, the full period of sixty-one days; the last publication thereof being in the issue dated the 30th day of December, 1884.

C. C. DAVIS.

Subscribed and sworn to before me, this 30th day of December, A. D. 1885.

MARK L. GOLDENBERG, [SEAL]
Notary Public.

Application for a Patent No. (3050) *for the Comstock Mine.*

U. S. LAND OFFICE,
LEADVILLE, COLO., *October* 28, 1884.

First Publication October 29, 1884.

Notice is hereby given that Peter Finerty *et al.* whose postoffice address is Leadville, Colorado, have this day filed their appli-
161 cation for a patent for 1500 linear feet of the Comstock mine or vein, bearing silver, with surface ground 300 feet in width, situate, lying and being in California mining district, county of Lake, State of Colorado, and known and designated by the field notes and official plat on file in this office as lot number 3613, in tp. 9 s., r. 79 w. of the sixth principal meridian, the exterior boundaries of said lot number 3613 being as follows, to-wit: Beginning at cor. number 1, whence E. ¼ cor. Sec. 24 tp. 9 S., R. 80 W., bears N. 83° 21′ 17″ W. 9246.12 ft., discovery shaft bears S. 35° 30′ E. 750 ft., thence S. 47° E. 1500 ft. to cor. Number 2, thence S. 11° 53′ E. 521.5 ft. to cor. number 3, thence N. 47° W. 1500 ft. to cor. number 4, thence N. 11° 53′ W. 521.5 ft. to place of beginning, containing 7.88 acres.

S. J. HANNA, *Register.*

Said "Exhibit Z" is endorsed as follows:

Form H. U. S. Mining Act, May 10, 1872. Proof of Publication. Filed in U. S. Land Office, at Leadville, Colo., Dec. 31st, 1884. S. J. Hanna, Register, Receiver."

162 Mr. CAVENDER: The defendants object for the reason that evidence cannot be introduced after five years from the recording of the deed. It is a bar under the statute. It is absolutely immaterial whether it was an acre, or ten thousand acres, or five thousand acres. Any irregularity in that record is barred by the statute.

The COURT: The objection is over-ruled.

To which ruling of the court, in overruling said objection, defendants by their counsel then and there duly excepted.

And thereupon the plaintiffs rest their case.

Defendants move to strike out all the testimony on rebuttal offered in support of such portions of their replication, which attempts to set up a claim of title to other than one third interest in the 1.82 acres in conflict with the Idaho claim, for the reason that said premises were not included in any adverse, or in any adverse suit, and attempt, by replication to set up a new cause of action entirely different and distinct from that set up in the original cause of action.

Which motion was by the Court over-ruled.

To which ruling of the Court, in overruling said objection, the defendants, by their counsel then and there duly excepted.

163 *Defendants in Rebuttal.*

Whereupon the defendants, to maintain the issues in their behalf, offered the following evidence in rebuttal.

W. T. BEAL, a witness re-called on behalf of the defendants in rebuttal, testified as follows:

Direct examination.

By Mr. CAVENDER:

Q. Have you in your possession the original letter from the Department of May 2, 1887, with reference to the Comstock lode?
A. Yes sir.
Q. Do you keep upon your original letters in the land office the date of service of notice under the letter?
A. Not always.
Q. In that particular case is the date kept there in the Land Office? Does it appear upon that letter?
A. Yes sir.
Q. What is the date of the service of the notice in the Land Department?
A. "Wilhelmina Gude notified by registered letter January 25, 1893; evidence of service sent to the General Land Office April 7, 1893."

Mr. ELDER: We object and move to strike out this evidence for the reason that it is immaterial and irrelevant, and that the proceedings of the land office except as to the finalities in reference to decisions are not material in this case.

The COURT: The objection is over-ruled.

164 To which ruling of the court, in over-ruling said objection, plaintiffs by their counsel then and there duly excepted.

The above and foregoing was all the testimony produced, introduced or offered upon the trial of the said cause by either of the parties thereto, and thereupon the respective parties rested their case.

Whereupon the case is argued by counsel.

Whereupon the court adjourns to 10 o'clock, A. M., December 2, 1902.

Pursuant to adjournment, court convened at 10 o'clock A. M. December 2, 1902.

Whereupon counsel continue the argument.

Whereupon court adjourned until 2 o'clock P. M., December 2, 1902.

TWO O'CLOCK P. M., *December* 2, 1902.

Pursuant to Adjournment court convened.

The COURT: The verdict will be for the plaintiffs, and they will prepare a decree to that effect.

To which finding and judgment of the court, defendants by their counsel then and there duly excepted.

165–171 Whereupon the court continues the case for the preparation of a decree.

And thereupon, and on to-wit: the — day of ——, A. D. — the court, being sufficiently advised in the premises, ordered a decree to be entered for the plaintiffs as follows, to-wit:

* * * * * * *

172 To which finding and judgment of the court the defendants, by their counsel then and there duly excepted and prayed an appeal to the Supreme Court of the State of Colorado, which was allowed by the court on condition that the defendants file an appeal bond with good and sufficient sureties to be approved by the Clerk of this Court in the sum of five hundred dollars, within — days from — day of —— A. D. —, and tender a bill of exceptions to the court within sixty days from said day.

And, now, forasmuch as the matters and things above set forth do not fully appear of record herein, the counsel for defendants presents to the court, this his bill of exceptions reserved by him upon the trial of said cause to the rulings, decisions and judgment of the Court, and prays that the same may be signed and sealed by the judge and made a part of the record herein, pursuant to the statutes in such case made and provided.

And it is done accordingly this 11th day of September, A. D. 1903.

P. L. PALMER, *Judge.* [SEAL.]

Tendered to me for signature, by counsel for defendants this 25th day of April, A. D. 1903.

FRANK W. OWERS, *Judge.*
P. L. PALMER, *Judge.*

173 Endorsed: District Court Lake Co. Filed April 27, 1903. Jno. H. Dunn, Clerk, By James J. Connell, Deputy. Filed in Supreme Court Sep. 16 1903. Horace G. Clark, Clerk.

174 In the Supreme Court of the State of Colorado.

TINGLEY S. WOOD (Impleaded with MARY L. BULLARD, ALMA L. FINNERTY, and CECILIA L. WAHRER), Appellant,

vs.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillan, Deceased, Appellees.

Assignments of Error.

Comes now Tingley S. Wood, appellant in the above entitled cause, by his attorney, and alleges and shows that — the trial of said cause and in the judgment and decree rendered therein numerous

and sundry errors were committed whereby the rights and interests of this appellant were sacrificed and grievous wrong and injustice were suffered by him, and that the following among other manifest errors and grounds of complaint in this regard existed in connection with said trial, to-wit:

I. That the court erred in over-ruling the motion of appellant that the appellee, George R. Elder, be dismissed from this cause as a party plaintiff, the successor to Samuel McMillen who was made a party without notice and without showing any interest in the suit by petition or otherwise.

175 II. The Court erred in allowing the introduction, over the objection of appellant, to the location certificate of The Comstock Lode.

III. The Court erred in allowing the admission in evidence of the deed of Ronald Morrison to Christiana Gude.

IV. The Court erred in allowing the introduction of deed from Christiana Gude to Wilhelmina Gude, over the objection of appellant.

V. The court erred in admitting in evidence the deed from Wilhelmina Gude to Samuel McMillan and John McCombe, over the objection of appellant.

VI. The Court erred in admitting in evidence the deed from Samuel McMillan to George R. Elder, over the objection of appellant.

VII. The Court erred in admitting a deed from Samuel McMillan to George R. Elder over the objection of appellant.

VIII. The Court erred in over-ruling the motion of the appellant to dismiss the said cause as to the plaintiff, George R. Elder.

IX. The Court erred in over-ruling the motion of the appellant to dismiss said cause so far as the same affected the one-sixth interest in The Comstock Lode claimed by the plaintiff, George R. Elder.

X. The Court erred in over-ruling objection of appellant to the introduction in evidence of the plaintiff's Exhibit "A."

176 XI. The Court erred in over-ruling objection of appellant to the introduction in evidence of the plaintiff's Exhibit I.

XII. The Court erred in admitting in evidence the files of the "Herald Democrat" for the year 1889 over the objection of appellant.

XIII. The Court erred in allowing the introduction in evidence of the proof of publication of the tax notice of 1889 over the objection of appellant.

XIV. The Court erred in allowing the introduction of the evidence, over the objection of appellant, of the assessment roll, Exhibit J.

XV. The Court erred in allowing the introduction of Exhibits K to W over the objection of appellant.

XVI. The Court erred in allowing the introduction of Exhibit X over the objection of appellant.

XVII. The Court erred in allowing introduction of Exhibit Y over the objection of appellant.

XVIII. The Court erred in allowing the introduction of Exhibit Z over the objection of the appellant.

XIX. The Court erred in adjudging that the plaintiffs in said cause should recover from the defendant an undivided one-third interest or any interest in The Comstock Lode in dispute in this action.

XX. The Court erred in ordering, adjudging and decreeing that the plaintiffs were entitled to an undivided one-third interest in the specific portion of The Comstock Lode described in the decree.

177 XXI. The Court erred in holding that the title of the appellant, Tingley S. Wood, held by him through and by virtue of a certain tax sale for the year 1888 to one-third interest in The Comstock Lode was of no force and effect and that the title of the appellees was superior thereto.

XXII. The Court erred in adjudging and decreeing that the title of the said Tingley S. Wood to a certain tax sale and the deeds from the County Treasurer to Carnahan and from Carnahan to the appellant Wood conveying the undivided one-third interest in The Comstock Lode, were void so far as the same affected the appellees or either of them herein.

XXIII. The Court erred in holding that the claims of the appellant Wood in said undivided one-third interest in the said Comstock Lode Mining Claim, were and are invalid, and in adjudging and decreeing that the plaintiffs, the appellants herein, were the owners of the same, or that the said George R. Elder was or is the owner of any interest therein.

XXIV. The Court erred in not entering a decree herein in favor of the appellant as against the appellees and each and every of them.

XXV. The Court erred in not sustaining the tax deed of the appellant of a one-third interest in The Comstock Lode.

XXVI. The Court erred in not sustaining the plea of the statute of limitations with reference to the tax title of the appellant to the one third interest in The Comstock Lode.

XXVII. The Court erred in allowing any evidence under

178 the replication in said cause.

XXVIII. That the replication does not state facts sufficient to constitute a reply to the answer of the appellant herein, and does not state facts sufficient to constitute any reply.

XXIX. That the pleadings herein on behalf of the appellee- do not state facts sufficient to constitute any defense to the answer of the appellant.

XXX. That the replication of the appellees herein does not constitute facts sufficient to constitute an action to quiet title.

XXXI. That the findings, judgment and decree are, and each of them is contrary to the law.

XXXII. That the findings, judgment and decree and each of them is contrary to the evidence adduced in said cause.

XXXIII. That there is a change of cause of action between that set forth in the complaint and that set forth in the replication.

CHAS. CAVENDER,
Attorney for Appellant.

Endorsed: No. 4724. In the Supreme Court of the State of Colorado. Tingley S. Wood *et al.*, Appellant-, *vs.* Alice J. McCombe,
8—393

et al., Appellees. Assignments of Error. Filed in Supreme Court Sep. 16 1903. Horace G. Glark, Clerk. Charles Cavender.

179 UNITED STATES OF AMERICA, *State of Colorado, ss:*

Be it remembered that on Monday, April 9th, A. D. 1906, the Supreme Court of Colorado re-convened at the hour of ten o'clock A. M., pursuant to law.

En Banc.

Present: Honorable William H. Gabbert, Chief Justice; Honorable Robert W. Steele, Honorable Luther M. Goddard, Honorable John Campbell, Honorable John M. Maxwell, Honorable Julius C. Gunter, Honorable George W. Bailey, Associate Justices; Nathan C. Miller, Esq., Attorney General; Horace G. Clark, Esq., Clerk; Richard W. Watson, Esq., Bailiff.

And afterwards, and on to-wit: May 15th, A. D. 1906, it being one of the regular Juridical days of the April Term, 1906, of said Court, the following proceedings, *inter alia,* were had and done, to-wit:

180 Sitting in Department 2.

Present: Honorable William H. Gabbert, Chief Justice; Honorable Julius C. Gunter, Honorable John M. Maxwell, Associate Justices; Nathan C. Miller, Esq., Attorney General; Horace G. Clark, Esq., Clerk; Richard W. Watson, Esq., Bailiff.

4724.

TINGLEY S. WOOD ET AL., Appellants,
v.
ALICE J. MCCOMBE ET AL., Appellees.

Appeal from the District Court of Lake County.

Come at this day the parties herein by their attorneys of record respectively, whereupon this cause is argued orally, and submitted to the consideration and judgment of the court.

181 And afterwards and on to-wit: the 4th day of June, A. D. 1906, the same being one of the regular juridical days of the April Term, 1906, of said Court, the following proceedings, *inter alia,* were had and entered of record, to-wit:

182 No. 4724.

TINGLEY S. WOOD (Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER), Appellant,

vs.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

Appeal from the District Court of Lake County.

Reversed.

Mr. Charles Cavender, for Appellant.
Mr. George R. Elder, *Pro Se.*

Mr. Justice MAXWELL delivered the opinion of the court:

December 31, 1884, Peter Finnerty and Wilhelmina Gude, owners of the Comstock lode mining claim, Lake County, Colorado, entered the same for patent in the United States Land Office at Leadville, Colorado, and a receiver's receipt for mineral entry No. 2411 for 9.67 acres was issued to them therefor.

May 2, 1887, the commissioner of the General Land Office held for cancellation 1.80 acres of the entry, which area was not included in the application for patent, by reason of the fact that such
183 area was in conflict with the Idaho lode mining claim United States survey No. 667.

December 12, 1894, the commissioner of the General Land Office cancelled mineral entry No. 2411 for failure to furnish certain proofs required by the department.

December 21, 1896, by order of the commissioner of the General Land Office, the entry of the Comstock lode was reinstated as to 7.88 acres, excluding however the area in conflict with the Idaho, 1.80 acres, for which last named area a supplemental application for patent was allowed and ordered.

Pursuant to this last order, June 19, 1897, appellants filed a supplemental application for patent for that portion of the Comstock included within the boundaries of the Idaho, being 1.80 acres.

August 19, 1897, John McCombe filed in the United States Land Office at Leadville, Colorado, his patent and adverse claim against such supplemental application for patent, and September 17, 1897, commenced this action against appellants in support of such adverse claim, alleging in his complaint that he was the owner of an undivided one-third interest in the Comstock, from which appellants had ousted him and unlawfully and wrongfully detained possession thereof from him, including that portion of the Comstock covered by the supplemental application for patent, to-wit: 1.80 acres, that the action was in support of his adverse claim theretofore filed in the land office, and to recover possession of plaintiff's one-third interest in the Comstock.

184 Mr. McCombe died. His administratrix and heirs at law were substituted as plaintiffs. Thereafter, one Samuel McMillen was made a party plaintiff, and upon the suggestion of his death, George R. Elder, successor in interest, was substituted. June 4, 1901, Tingley S. Wood, one of the defendants and appellant here, filed his answer denying the material averments of the complaint and affirmatively pleading title to an undivided one-third interest in the Comstock, in himself, under and by virtue of a tax deed dated August 8, 1892, recorded August 11, 1892, which tax deed was issued by the county treasurer of Lake County to one C. T. Carnahan and the property thereby conveyed to Carnahan, subsequently conveyed to Mr. Wood; that such tax deed was based upon a tax sale of the interest of Wilhelmina Gude in the Comstock lode made August 5, 1889 for delinquent taxes assessed against the property for the year 1888; the Statute of Limitations, Mills' Ann. Stats., §3904, possession in himself and grantor, and payment of taxes since 1892 were also pleaded.

July 21, 1902, Mr. Elder filed a reply denying the material affirmative allegations of Mr. Wood's answer and upon numerous grounds attacked the validity of the tax deed title relied upon by Mr. Wood. The principal grounds of such attack are, that in 1888, the year when the property was assessed under which the sale for delinquent taxes was made, the title was in the government of the United States and the property was not subject to assessment or taxation; that the advertisement of the tax sale was made by publication in the
185 Sunday issue only of a newspaper, and therefore invalid, and the subsequent proceedings thereunder void; that the payment of all taxes subsequent to such sale was without force or effect, for the reason that the title being in the government the assessment of the property and its taxation was without authority; that 1.80 acres included in the assessment of the property never was a part of the property, and that the inclusion of such area in the assessment and taxation rendered the whole assessment void.

By stipulation the reply of Mr. Elder stood as the reply of the heirs of Mr. McCombe.

A trial to the court without a jury resulted in a decree in favor of plaintiffs and against defendant, Wood, for an undivided one-third interest in the Comstock lode mining claim United States survey No. 3613, an undivided one-third interest in that portion of the Comstock in conflict with the Idaho, to-wit: 1.80 acres, that Mr. Wood had no interest whatever in the Comstock and that the tax deed to Carnahan and Carnahan's deed to Wood were invalid and void.

Two questions decisive of this appeal are presented by this record. 1. Are mining claims in this state which have not been patented or entered for patent subject to taxation? 2. Had the bar of the Statute of Limitations (§3904 Mills' Ann. Stats.) run in favor of appellant Wood before the commencement of this action?

1. The general assembly at its session of 1887 enacted legislation for the taxation of mines and mining property, the first section of which is:

183 "All mines and mining property of the class heretofore exempted by the constitution of the state of Colorado, shall

hereafter be assessed and taxed, and the taxes levied enforced by sale of the property taxed, in default of payment, in the same manner as is now or may be provided by law, in the case of other classes of taxable real estate."

Section 2 provides a form for the description of such property for the purposes of taxation and assessment.

Section 3 construed with section 1, classifies all mines and mining property and possessory rights therein, for the purpose of assessment and taxation, into those producing during the fiscal year an amount exceeding $1000.00, and those producing less than that amount or nothing at all.

Section 4 provides: "In case the mine or mining claim shall not be patented, or entered for a patent, but shall be assessable and taxable under this act, on account of producing gross proceeds, then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado."

Laws 1887, §§340-341, Mills' Ann. Stats., §§3222-3225.

This statute was under consideration by this court in People *v.* Henderson, 12 Colo., 369 and its meaning construed. Mr. Chief Justice Helm, writing the opinion of the court, said:

"Section 1 of the act before us contains an express legislative declaration that, after the adoption thereof, mines and mining claims bearing precious metals shall be taxed for revenue. All such
187 property, regardless of its tenure,—that is, whether held under patent, application for patent, or mining location, and regardless of the question as to whether the value thereof be much or little,—is clearly and unequivocably subjected to taxation.

In effect, sections 1 and 3 of the act, taken together, divide this species of property into two classes, viz.: First, the mines or mining claims referred to in section 3, *i. e.*, those which during the preceding fiscal year have had a gross output aggregating upwards of $1,000 in value; and second, all the remaining or non-producing claims, without reference to value."

In summing up, the conclusions are stated as follows:

"Therefore by the act in question, we are advised: *First*, that all mines and mining claims containing precious metals are subjected to taxation; *second*, that this species of property is divided into two classes, viz., those mines producing upwards of $1,000 during the fiscal year preceding, and those producing less than that sum or nothing at all; and *third*, that a specific method is provided for the valuation of mines belonging to the first class while all mines and claims included in the second class are to be assessed in the manner indicated by law for the assessment of other taxable real estate."

In Pilgrim C. M. Co. *v.* Teller County, 32 Colo., 334, at pages 338-9 the doctrine above announced is approved.

It is therefore settled in this state, under laws 1887, that all mines and mining property bearing precious metals, regardless of
188 its tenure, that is, whether held under patent, application for patent or mining location, are subject to taxation. By sec-

tion 4 of the Act, *supra*, the possession is the subject of assessment and a sale to enforce payment of delinquent taxes, under the general revenue laws of the state, passes the title and right of possession to the purchaser.

11. §3904 Mills' Ann. Stats., relied upon by appellant as a bar to this action is:

"No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary, notwithstanding." * * *

Under §3902 Mills' Ann. Stats., a tax deed executed by the county treasurer in his official capacity, properly attested, acknowledged and recorded vests in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and is made *prima facie* evidence of the following facts:

"First. That the real property conveyed was subject to taxation for the year or years stated in the deed.

Second. That the taxes were not paid at any time before the sale.

Third. That the real property conveyed had not been redeemed from the sale at the date of the deed.

Fourth. That the property had been listed and assessed at the time and in the manner required by law.

Fifth. That the taxes were levied according to law.

Sixth. That the property was advertised for sale in the manner and for the length of time required by law.

189 Seventh. That the property was sold for taxes as stated in the deed.

Eighth. That the grantee named in the deed was the purchaser or the heir at law, or the assignee of such purchaser.

Ninth. That the sale was conducted in the manner required by law."

To the introduction of the tax deed under consideration, appellees interposed an objection based upon 7 grounds, not one of which assailed the deed for invalidity upon its face, that is, for such invalidity as appears upon the face of the deed, without the aid of evidence *aliunde*. Although the deed is not set forth in the abstract of record, we have examined it with care as it appears in the transcript, and conclude, that it is not subject to the objection that it is invalid upon its face, although counsel for appellee Elder repeatedly states in his printed argument and brief that it is void upon its face.

In Sullivan *v.* Collins, 20 Colo., 528, 532, in considering the force and effect of the statute (Section 3904 Mills' Ann. Stats.), this court said:

"The statute is for the purpose of protecting claimants under tax deeds, and to that end it is provided that an action by the owner shall be barred if not brought within five years after the sale thereof."

In Williams *v.* Conroy, — Colo., —, 83 Pac., 959, from the statement of facts it appears that plaintiff relied upon tax deeds which were recorded and under which he held for more than five

190 years without any action by the original owner or any other person in any way questioning that title. Defendant claimed title, first, under tax deeds which were recorded less than five years,

but under which actual possession was not taken by him for more than five years after the date of recording of plaintiff's tax deed, and second, by virtue of a quit-claim deed executed and delivered by the original patentee owner in February, 1902, and which was after this action was begun and before the amended answer was filed. It also appears that the tax deeds of both plaintiff and defendant were regular and valid upon their face, but by reason of informalities in the sale, as matter of law, they were both void. The court said, Mr. Justice Campbell writing the opinion:

"The defendant obtained nothing by his quitclaim deed, for section 3904 Mills' Ann. Stat., says that no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of a deed therefor by the treasurer, any law to the contrary notwithstanding. More than the full period of five years prescribed by this act of limitation had expired without any act of any sort by the patentee owner to recover possession or to question plaintiff's title under his tax deeds. The quitclaim deed gave to the defendant such rights and such only, as the grantor himself had. The patentee owner's title, under section 3902, Mills' Ann. St., was completely extinguished and barred; hence the patentee had nothing to give when he executed his quitclaim deed, and the defendant received nothing thereby.

191 Express authority for this conclusion is found in Crisman *v.* Johnson, 23 Colo., 264, 47 Pac. 296, 58 Am. St. Rep. 224; De Foresta *v.* Gast 20 Colo., 307, 38 Pac., 244, and Bennet *v.* N. C. S. L. & I. Co., 23 Colo., 470, 48 Pac., 812, 85 Am. St. Rep., 281, which hold that a void deed, taken in good faith, constitutes sufficient color of title under our statute of limitations. See, also, Desty on Taxation, §149. That the patentee's title was extinguished, and the same vested in the plaintiff under the facts of this case, see, also, Lebanon Mining Co. *v.* Rogers, 8 Colo., 34, 5 Pac., 661; Moingona Coal Co. *v.* Blair, 51 Iowa, 447, 1 N. W. 768; Harris *v.* Curran, 32 Kan., 580, 4 Pac., 1044; Griffin *v.* Turner, 75 Iowa, 250, 39 N. W., 294; Black on Tax Titles, (2d Ed.), §284; Shawler *v.* Johnson, 52 Iowa, 472, 3 N. W., 604.

Morris *v.* St. Louis Nat. Bank, 17 Colo., 231, 29 Pac., 802, is not opposed to this conclusion. There are some observations in the opinion, in the nature of dicta, which might seem pertinent, but the holding was that the statute of limitations we are considering was not applicable to that case, as the action was not 'for the recovery' of land, and the deed had not been on record for five years before the action was brought."

It appears from the record, that McCombe and McMillen acquired by deed the interest of Wilhelmina Gude in the property, two years and 4 months before the bar of the statute attached, during which time no action was taken by them or either of them to test the validity of the tax deed, while Mr. Elder's deed, from Mr. McMillen was dated two years and two months after the bar of the statute had attached and about two years after this suit was commenced.

192 Mr. Elder's grantor had no title in the property to convey at the time he made his deed, the same having been com-

pletely extinguished and barred under §3904 Mills' Ann. Stats. Williams *v.* Conroy, *supra.*

Our conclusions are, that under and by virtue of §§3222-25 Mills' Ann. Stats., the Comstock lode was subject to assessment and taxation in the year 1888; that the taxes assessed against the same being delinquent in 1889, the property was subject to sale in that year; that the tax deed issued by the county treasurer August 8, and recorded August 11, 1892, was authorized, and not being invalid upon its face, was *prima facie* evidence of the matters stated in §3902 Mills' Ann. Stats., *supra;* that the title and right of possession of McCombe and McMillen vested thereby in the purchaser, Carnahan, and was by him conveyed to Mr. Wood, and that no action for the recovery of the title conveyed by such tax deed could be maintained against one who had been in the possession of the premises under such tax deed during the full period of five years from the date of the record of the tax deed, at the time this suit was commenced, under §3904 Mills' Ann. Stats., *supra.*

The judgment and decree must be reversed and the cause remanded with instructions to vacate the same, and enter judgment for appellant Wood, for possession of the premises according to the prayer of his answer.

Reversed.

The Chief Justice and Mr. Justice Gunter concurring.

(Endorsed:) Filed in Supreme Court Jun- 4 1906. Horace G. Clark, Clerk.

193 No. 4724.

TINGLEY S. WOOD (Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, Appellant,

v.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

Appeal from District Court of Lake County.

At this day this cause coming on to be heard as well upon the transcript of proceedings and judgment had in said District Court in and for the County of Lake as also upon the matters assigned for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the Court, and it appearing to the Court that there is manifest error in the proceedings and judgment aforesaid of said District Court. It is therefore considered and adjudged by the Court that the judgment and decree aforesaid of said District Court be, and the same is hereby reversed, annulled, and altogether held for naught; and that this cause be remanded to said District Court with instructions to vacate the judgment and decree and enter judgment for appellant Wood for possession of the premises, according to the prayer of his answer.

It is further considered and adjudged by the Court that
194 said appellant do have and recover of and from said appellees his costs in this behalf expended, to be taxed, and that he have execution therefor. And let the opinion of the Court filed herein be recorded.

195 And afterwards and on to-wit: the 13th day of June, A. D., 1906, the same being one of the regular juridical days of the April Term, 1906, of said Court, appellee herein filed his Petition for Rehearing, which said petition is in the words and figures following, to-wit:

"No. 4724.

In the Supreme Court of the State of Colorado.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER), Appellant,

vs.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

Petition of Appellee for Rehearing.

George R. Elder, counsel *pro se.*

(Endorsed:) Filed in Supreme Court Jun- 13 1906. Horace G. Clark, Clerk.

196 In the Supreme Court of the State of Colorado.

No. 4724.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER), Appellant,

vs.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

Petition for Rehearing.

And now comes the Appellee herein, George R. Elder *pro se,* and files this his petition for a re-hearing in the above entitled cause, and for grounds for granting such re-hearing alleges:—

I.

That the Court erred in refusing to sustain or even discuss in its opinion the conclusion of Judge Palmer, as stated in paragraph 8, page 14, of Appellee's Brief.

"Eighth. That the forfeiture claimed by defendant under his tax deed of date August 7th, 1892, of the property of plaintiffs, was not made by due process of law and under the 'law of the land' and was in violation of and in direct contravention of Section twenty-five (25) of Article two (2), Constitution of Colorado, which reads:

"That no person shall be deprived of life, liberty, or property without due process of law."

And of Section one (1), Article five (5) Fifth Amend-
197 ment of the Constitution of the United States, which reads:

"Nor be deprived of life, liberty, or property without due process of law."

The learned Justice who prepared the opinion of the Court in this case failed to consider in a single line or syllable of his opinion, the question that a notice of tax sale published exclusively on Sunday was not a legal notice of sale; was not the orderly compliance with the statute, or that a sale under such notice was absolutely void and vested no title in the purchaser, and that no such sale took place, and that the publication of such notice was a fundamental step in the process of law to deprive the citizen of his property for failure to pay taxes, and that without this step jurisdiction was lacking in the officers to create such forfeiture.

The failure of the Justices sitting in this division to even mention in their opinion, the question whether the Tax Deed was based upon such jurisdictional steps as constituted due process of law, and was made by, through and under the "law of the land;" establishes the fact that no proper consideration was given by the court to the real merits of the controversy, and this omission alone should entitle appellees to have a re-hearing of this case.

Should this decision, reversing the judgment of the District Court of Lake County in favor of appellees, and instructing the entry of a judgment for appellant Wood for possession of the premises according to the prayer of his answer be upheld, it would be confiscation and would be the taking of the private property of appellees without

due process of law, in direct violation of and in contravention
198 of Section twenty-five (25), Article two (2), of the Constitution of Colorado, and Section one (1), Article five (5), Fifth Amendment of the Constitution of the United States.

The clear and distinct omission by the court in its opinion to give any weight or consideration to this contention of appellees, is entirely inexplicable to counsel. It is almost a universal proposition upon the consideration of tax deed titles, both in the *nisi prius* courts and the appellate courts, to consider first, last and all the time, whether the divestiture of title by tax sale has been made in full compliance with the law, has been made by due process of law, and by the law of the land.

The sale upheld by this decision of the court was made without

notice at all, and was in fact and legal effect no sale at all. By it no rights were divested. Under it no rights could be obtained; worthless itself, all proceedings founded upon it were equally worthless; it neither binds nor bars any one. The purchaser at the sale, by virtue of its execution, found himself without title, nor could anything resurrect it or breathe into it any elements of power, life, or vitality. That which was originally void cannot by mere lapse of time be made valid, and no such void claim of title by force of an act of limitation can ripen into a conclusive title.

The court in its opinion overlooked the fact that appellees proved beyond a doubt that no sale of the land covered by this suit ever occurred. The advertisement was made on a non-juridical day, and the owners of this Comstock claim were not required to take
199 any notice of it, and the power of the officer to sell was absolutely lacking. The decree of the court below found that there was no sale, and that it required a *bona fide* actual sale to set the statute in motion. Without a sale the statute of limitations cannot avail appellant; there was nothing to bring his deed within the operation of the statute; with no sale there was nothing for the statute to run in favor of or against, and nothing to set it in motion. Where there has been no sale of the land—no fiction of law can draw to a deed based on it—a constructive possession to start a statute of limitations running.

Every text-book upon tax titles, every tax title case in the Reports, and every authority upon constitutional construction, and the vast weight of common sense and judicial opinion, is against the proposition advanced by the court and upheld in this opinion, that a statute of limitations can cure the objection that an alleged tax sale in fact never took place. Such a statute would be unconstitutional, as its effect would be to deprive the owner of property without due process of law.

The court failed to even discuss or consider the appellees' contention that a tax sale without published notice is a deprivation of their property without due process of law, and that there cannot be due process of law unless the notice has been published and that the court whistles the rights of the appellees down the wind, with a careless and reckless construction and application of these constitutional provisions invoked by appellees.

In Galpin *v.* Page, 18 Wall., 350, Justice Field says:

"It is a rule as old as the law, and never more to be re-
200 spected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered."

This Honorable Court has held in Schwed *v.* Hartwitz, 23 Colo., 189, that a tax sale notice is process, and that the publication of notice of sale of real estate for taxes in a Sunday newspaper does

not constitute legal notice, and a sale based on such publication is void.

The opinion of the court in the case at bar is absolutely silent and dumb in its reply to the request of appellee- to interpret Section 25, Article 2 of the Constitution of Colorado, and section 1, Article 5, Fifth Amendment of the Constitution of the United States, with the facts of this case and the evidence and finding of the court below, that there was no notice as made mandatory by the statutes of Colorado, and that no sale took place.

The forfeiture and divestiture of title by tax sale is a summary one, and there is no provision of law by which a court can make a finding, render a judgment, make a decree, or an order as to the correctness or validity of the proceeding. The state does not go into a court, nor does the state require or allow the owner of the land taxed to enter a court to have the right of the state to sell the land tried. Section 25, of Article 2, applies directly to sales
201 for taxes like the case at bar, and where the state divests a citizen of his property without due notice, which in this case must be due process of law, it is a violation of the section of the Constitution referred to, and neither the statute of limitations, the legislature of this state, nor this decision at bar can make this void sale effective against the title of appellees. By this holding of the court appellant has been invested with the title to this property without any process of law whatever, and appellees and their grantor are divested of their property and they have not been permitted their day in court.

It is a travesty upon justice for this court to hold, as is the practical effect of this decision, that after the court below has sustained the plea of appellees, that Sec. 25, Art. 2, Constitution of Colorado, and Sec. 1, Art. 5, Fifth Amendment to Constitution of the United States, was a shield against the void title of appellant that a legislative act of limitation can give life health and force to such a void sale. If the legislature of this state were to enact a statute conferring the right to condemn the citizen and to forfeit his property, without any notice, and without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of these two sections of these constitutions? This being true, as it undoubtedly is, how can it be said that the appellate judicial department of this state, the source and fountain of justice itself, has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the constitution. If such power is reposed in the Supreme Court of Colorado, then the
202 judicial department of this state, sitting to uphold and enforce the constitution, is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

This question was raised in the court below, in paragraph 11, of the Replication of Appellee (Folios 66-95, Abst., p. 10), as follows:

"11. Plaintiff expressly alleges that the assessment and the tax

sale thereof was beyond and outside of the power and jurisdiction of the taxing officers, and by reason of the fact that the title to said premises remained and continued in the United States from the second day of May, 1887, up to and till September (December) 21st, 1896, and still remains in the United States at this date to a large portion thereof, and was and is, therefore, not subject to taxation by the State of Colorado, and by reason of the void and invalid advertisement of said premises for tax sale in a Sunday newspaper; which would divest the owner of his property without due process of law, and that no estoppel can arise under and by virtue of section 3904 of Mills' Annotated Statutes of the State of Colorado, being section 1, of page 320, of the Laws of 1885. And plaintiff further alleges that to entitle defendant to plead that statute his title must have some other and firmer basis than a void assessment of property not subject to taxation, and a void process of sale by means of a tax sale notice published only on Sunday."

203 This court, in Brown *v.* City of Denver, 7 Colo., 311, discussing "due process of law" under Sec. 25, Art. 2, says:

"The doctrine of the authorities is that, whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise; at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guarantees above cited are infringed."

So also, Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo., 55:

"The courts have uniformly held that this requirement demands that there shall be notice and hearing before condemnation. Any proceeding which violates these principles is not "due process of law," and is not according "to the law of the land." Where the property of a citizen is taken and condemned without notice to him, it is entirely immaterial whether it be a special or general judgment; the fundamental wrong in such case being that his property is taken and conveyed to some other person without his knowledge."

Quoting

Stuart *v.* Palmer, 74 N. Y., 183.
Clark *v.* Mitchell, 69 Mo., 627.

204 Justice Helm says in *In Re* Senate Bill No. 65, 12 Colo., 469:

"It is a principle declared by our constitution (Sec. 25, Art. 2), and of universal recognition, that no person shall be deprived of life, liberty or property without due process of law. But there cannot be due process of law unless the party to be affected has his day in court."

Again—Crisman *v.* Johnson, 23 Colo., 264:

"A statute undertaking to obviate the objection that an alleged tax sale in fact never took place would be unconstitutional, as its effect would be to deprive the owner of property without due process of law."

We do not have to stray from the opinion of Chief Justice Elbert in the case of Gormer *v.* Chaffee, 6 Colo., 317, to find the only true and correct exposition of the law applicable to this case.

"It is difficult to see how the statute of limitations can avail a defendant holding a void deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor the right of actual possession.

"The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of law."

This decision of the Supreme Court of Colorado has never been reversed and is now the law of this state, and has been more frequently quoted and affirmed by the Supreme Court of the United States and Appellate Courts of the other states than any other tax title case in the Colorado Reports. It is the law of this state and covers every contention of the appellees made in the court
205 below, where Judge Palmer acted in obedience to its principle, and in this court where we have claimed the benefit of its broad and enlightened ruling.

In the opinion of Justice Maxwell, his holding is the direct reverse of the holding of Chief Justice Elbert, and he now holds that section 3904, the Statute of Limitations in question, applies to void proceedings in violation of law. In this he disagrees also with

Moore *v.* Brown, 4 McLean, 211, 11 How., 414;
Redfield *v.* Parks, 132 U. S., 239;
Lane *v.* Shepardson, 18 Wis., 59;
Shoat *v.* Walker, 6 Kan., 65;
Waterson *v.* Devoe, 18 Kan., 223;
Mason *v.* Crowder, 85 Mo., 526;
Sheehy *v.* Hinds, 27 Minn., 259;
Cutler *v.* Hurlbut, 29 Wis., 152;
Wofford *v.* McKinna, 23 Tex., 36;
Hurd *v.* Brisner, 3 Wash., 1;
Horswill *v.* Farnham, 16 S. Dak., 414;
Coulter *v.* Stafford, 56 Fed., 564;
Breisch *v.* Cox, 81 Penn. St., 336;
Blackwell, Sec. 919, 5th Ed.;
Black, Sec. 498;
Morris *v.* St. Louis Nat'l Bank, 17 Colo., 233.

We refer to our original brief, where we have discussed these propositions more at length (Pages 14-22, 31-33, 41-49, 58-59).

We therefore challenge the decision rendered in this case by Chief Justice Gabbert—Justices Maxwell and Gunter sitting as a
206 division of this court—that it was in violation of and in direct contravention of section twenty-five (25) of Article two (2), Constitution of Colorado, and of Section one (1), Article five

(5) Fifth Amendment of the Constitution of the United States. That the judgment and decree of Judge Palmer, sitting for the District Judge of the Fifth Judicial District, expressly decided that the forfeiture claimed by appellant under his tax deed of date August 7th, 1892, of the property of appellees, was not made by due process of law, and under the "law of the land."

That in reversing the decree and judgment in the court below that Division of the Supreme Court assured jurisdiction to construe section twenty-five (25) of Article Two (2), Constitution of Colorado, and of section one (1), Article five (5) Fifth Amendment of the Constitution of the United States.

That such assumption of jurisdiction was in disregard of, in conflict with, and in violation of the last paragraph of section five (5) of Article six (VI) of the Constitution of Colorado as amended, which reads as follows:

"And no case involving a construction of the Constitution of this State or of the United States shall be decided except by the court *en banc.*"

Wherefore, Appellee prays and petitions the Honorable Supreme Court of the State of Colorado sitting *en banc*, to set aside the decision of that Division of this court in this case, and to hear and decide this case *en banc* as required and provided by section 5 of Article six (*1*) of the Constitution of the State of Colorado as amended.

207 II.

That the court erred in its finding that the unentered, unpatented area of the Comstock lode, the property of appellees, was taxable under the Act providing for the taxation of mines and mining property in Colorado, Session Laws 1887, pp. 340–342.

The court states one question as decisive of this appeal presented in this record is:

"Are mining claims in this state which have not been patented or entered for patent subject to taxation?"

Judge Palmer, sitting in the court below, decided this question stated by the court in the negative. His judgment and decree found: That the preliminary cancellation of 1.80 acres of the Comstock claim May 2nd, 1887, by the Commissioner of the General Land Office, and the final cancellation of the entire Entry No. 2411, Comstock Lode, August 7th, 1894, and December 12th, 1894, rendered the entire claim untaxable and beyond the jurisdiction, power and authority of the officers of Lake County to assess, tax and sell as they attempted to do; and his judgment and decree for appellees was based upon the fact that the deed showed upon its face a total area of 9.67 acres, and that the evidence disclosed that the title to 1.80 acres of this area remained in the United States, and was claimed by other parties than the parties to this suit, and was therefore untaxable under the statutes of Colorado, and that the deed showed upon its face a total consideration of $1.38—one dollar and thirty-eight cents—and that the evidence disclosed that this
208 amount included illegal taxes blended in the consideration expressed upon government land of the United States for

which no Receiver's Receipt was issued, and that the county treasurer was without power to include in the area conveyed by defendant's deed government land which was still owned by the United States.

Judge Palmer could reach no other conclusion, for the simple, plain and unambiguous reason that mining claims held under possessory rights alone in the state of Colorado, are not assessable, are not subject to tax lien, and are not subject to sale for taxes, unless they produced mineral during the year exceeding in value the sum of one thousand dollars.

These possessory rights are not assessable and taxable and subject to sale unless the mining claims come under the class of productive possessory claims, and have produced gross proceeds during the year, and sections 3 and 4 of Session Laws of 1887, pp. 341–342, apply exclusively to mining claims producing mineral and as termed "gross proceeds." These two sections three and four are the only sections providing for the assessment, taxation and sale of the possessory rights or location rights to mining claims, and they expressly limit that assessment and taxation to the fact of their producing mineral exceeding one thousand dollars in any one year.

In fact, Section 5 of the same Act, in defining the duties of the county clerk under the terms of the Act, directly and expressly confine him in making up his list (lines 3 and 4, section five) to the following words:

"The name and locality of all productive possessory claims in his county."

209 There is no contention in this case that the Comstock lode ever came under the class of a productive possessory claim, until the year 1900, and the sale attacked in this case was made upon a flat acreage assessment in the year 1888.

In the court's opinion, Justice Maxwell settled this one question decisive of this appeal in the affirmative, in the following language:

"It is therefore settled in this state, under laws 1887, that all mines and mining property bearing precious metals, regardless of its tenure, that is, whether held under patent, application for patent or mining location, are subject to taxation. By Section 4 of the Act *supra*, the possession is the subject of assessment, and a sale to enforce payment of delinquent taxes, under the general revenue laws of the state, passes the title and right of possession to the purchaser."

This is the most astonishing and inconsistent construction of a plain, simple statute of the state of Colorado which it has been the good or ill fortune of counsel for appellees to encounter in the many years he has followed the uncertain profession of the law.

Looked at in its practical economical effect upon the empty treasuries of the thirty-eight precious metal counties of this state, it is a magnificent discovery; its discoverer's name is entitled to be enrolled with that of the discoverers of great continents, like Columbus. We hasten to claim this distinguished honor—for our fellow townsman and neighbor—the writer of the opinion in this

210 case. The pity of it is that the discovery of the fact that an unpatented, unentered mining claim, held simply under mining location rights was clearly taxable under the laws of 1887,

as stated by Justice Maxwell in his decision, remained so long hidden from the gaze of the Colorado taxing officers until that day of the Lord June 4th, 1906, when it first saw the light of day in this illuminating opinion of the court. When this act of 1887 went into effect the County of Lake alone had fifteen thousand recorded mining claims, of which number less than 3,000 were patented or entered for patent; under this marvelous interpretation of the Act of 1887, twelve thousand of these mining claims held under the possessory title of the United States, were subject to assessment, taxation, and sale. The average return for a patented mining claim as taxed in Lake County since 1888 has been about ten dollars per claim. Think of it, Assessors, Treasurers and County Attorneys of Lake! You have failed in your duties, your judicial blindness has caused a net loss of $120,000 per year to the treasury of Lake County, or a gross loss in the eighteen years to the County of Lake of rising $2,160,000. As Brother Cavender, counsel for appellant, and the counsel for appellees have represented Lake County for nearly eleven years as county attorneys of Lake County—our joint stupidity and ignorance of this splendid discovery has cost Lake County over a million and a quarter of good, hard dollars. We have sinned grievously; we should hunt up our commissions as barristers and counsel of this Honorable Court, signed by Justices Elbert, Thatcher and Stone, and surrender them, to be burned by the common hangman by sol-
211 emn decree of this Honorable Court. When the fancy dwells upon what the thirty-eight precious metal mining counties of this state have lost by this long-deferred discovery of Justice Maxwell, and the vast and ever-accumulating benefits these counties will receive from this enlightened opinion when enforced by the full power of the taxing officers of the state and the Supreme Court of Colorado, we are driven to the conclusion that his name as a financier should rank with that of Alexander Hamilton, who struck the barren granite of the Nation's resources with his wizard wand, and bounteous streams of revenue burst forth.

The construction placed upon this statute by Judge Palmer is sustained by the uniform practice of the County Assessors, County Treasurers, County Attorneys and County Commissioners of the thirty-eight mining counties in this state; not to assess unpatented mining locations or their possessory rights unless for gross or net proceeds of ore, for nearly twenty years, and by the fact that this principle of taxation of bare mining locations by flat acreage tax has never been even claimed before in an opinion of this court, any other court, or taxing officer.

The assessment and taxing right under sections 3 and 4 of that act of 1887 is not aimed at the land at all; the product, whether net or gross proceeds, are the only objective points which the statute considers as taxable, and the possessory right, which is always liable to lapse or be destroyed, is the only right the Act gives a lien upon.

There is no rule of judicial construction by which it may be claimed; that the case of People *v.* Henderson, 12 Colo., 369, passes upon this question that a flat acreage tax may be assessed against

unentered, unpatented mining possessory rights; or that it
212 announced or advances any other proposition than the single one, that a productive mine, whether patented or not, may, under sections 3 and 4 of the act be correctly valued for taxation under an estimate of its gross proceeds.

In Pilgrim C. M. Co. *v.* Teller Co., 32 Colo., 334, there is not one line determinative of or squinting at the taxation of possessory mining rights or locations, except when they are assessed and valued under the precise limitations of sections 3 and 4 of the act upon a net output or gross proceeds valuation above one thousand dollars and classed as productive possessory claims.

Not only this, but the highest judicial authority in the land, the Supreme Court of the United States, has decided the exact reverse of the position upheld by this opinion.

The rule of law is undisputed and universal that: "While the title remains in the government, public lands are not subject to state taxation, and tax sales and tax deeds thereof are void; and one subsequently acquiring title thereto can contest their validity."

Hussman *v.* Durham, 165 U. S., 145;
Hussman *v.* Durham, 88 Iowa, 29;
K. P. R. R. Co. *v.* Prescott, 16 Wall., 603;
Railway *v.* McShane, 22 Wall., 144;
North. Pac. R. R. Co. *v.* Rockne, 115 U. S., 600;
Central Colo. Imp. Co. *v.* Pueblo Co. Commissioners, 95 U. S., 259;
Cooley Tax'n, 3rd Ed., 1903, p. 136;
213 Pitts *v.* Clay, 27 Fed. Rep., 635;
Coulter *v.* Stafford, 56 Fed. Rep., 564;
Bronson *v.* Keokuk, 3 Dill., 490;
Campbell *v.* Spears, 120 Iowa, 670;
Duncan *v.* Newcomer, 9 S. D., 375;
Scott *v.* Chickasaw Co., 46 Iowa, 253;
Reynolds *v.* Plymouth Co., 55 Iowa, 90;
Moriarity *v.* Boone Co., 39 Iowa, 634;
Kohn *v.* Barr, 52 Kan., 269;
Calder *v.* Keegan, 30 Wis., 126;
Davis *v.* Magoun, 109 Iowa, 308.

For this manifest, palpable and egregious error we challenge the finding of the court, and submit that for this alone a rehearing of this case should be granted appellees. If this opinion is allowed to stand as written, it will be more productive of evil in interminable litigation in this state than all the armies sprung from the fabled dragon's teeth, caused the Hellenic world.

Justice Maxwell states in his opinion that the answer to this question is decisive of this case. We agree with him, but it has only one logical legal decision, and that is in the negative as decided in this case, by Judge Palmer—and the decree should be allowed to stand as entered.

III.

That the court erred in its finding that Sec. 3904 Mills' Annotated Statutes, was a bar to the recovery and decree entered by the court below in behalf of appellees.

214 The court says incorrectly that "not one of the seven objections assailed the deed for invalidity upon its face without the aid of evidence *aliunde*."

This statement is incorrect, as can readily be ascertained from the first, second and third objections of plaintiff to this tax deed (pp. 172–177, Trans.).

"First. Because it appears upon its face that it contains an area of 9.67 acres, and a part of this area, 1.80 acres, was cancelled by letter of the Hon. Commissioner of the Land Office dated May 2nd, 1887, which cancellation still remains in force and effect to this date, Dec. 1st, 1902, and under the laws of this state that portion of 1.80 acres was not taxable for the year 1888, nor could it be sold in the year 1889, and the deed is therefore void and can pass no title against these plaintiffs.

Second. That, including as it does ground for which no Receiver's Receipt is issued, the assessment and taxation thereof was void, and the sale was void because illegal taxes were blended in the consideration expressed of $1.38.

Third. That the subsequent cancellation of the whole claim by letter of the Commissioner, dated December 12th, 1894, cancelled the entire entry made December 31st, 1884, and the property was not subject to taxation from May 2nd, 1887, to and until December 12th, 1894, and neither the assessor nor the county treasurer of Lake County had the power to assess the same."

To convict the court of something worse than judicial mistake, oversight and blindness in making such a misstatement of the record, we have only to quote what we printed in heavy-faced type

215 upon pages 23 and 30 of Appellee's Brief in this case.

P. 23. "The tax deed showing on its face, in the consideration expressed the inclusion of illegal taxes assessed against untaxable, unentered government land, is void upon its face and could not divest plaintiffs of their possessory right to this property."

P. 30. "The tax deed, showing on its face, the inclusion in the land conveyed; of untaxable, unentered government land, is void upon its face; and could not divest plaintiffs of their possessory right to this property."

All these matters appear on the face of this deed, and Judge Palmer was able to see them in the trial of this case below. The pendency of this adverse suit itself caused by this supplemental application for patent of the Comstock Lode, the adverse suit of T. J. Cash, H. W. Havens and Jerry Collins instituted by the Collins Lode *vs.* the Comstock Lode Sept. 18th, 1897, for the recovery of 2.05 acres of the Comstock Lode (Case No. 5025 of the Docket of the District Court of Lake County), and the fact, clear and plain as the noonday sun, that a part of the area is unentered government land, and that taxes assessed against this unentered area are included in the consideration of the tax deed establishes this contention of appellee.

Let us state a concrete case: The lots of the United States Postoffice Building in Denver adjoin the lots of the Tabor Opera House; by an error like the one in this case the numbers of all these lots are assessed in the same name and sold together; a deed is made

to a tax purchaser; the years of the present seven-year limita-
216 tion roll by, and the tax deed is called in question, upon the ground that the lots belonging to the United States were not taxable under the laws of this state and the United States. The very statement of this case shows the fallacious construction of the court in disputing what we have claimed in this case, and what Judge Palmer decided below. The simple identification of the Postoffice lots as government property would render the deed absolutely void on its face, and the inclusion of the illegal taxes in the consideration would render the deed void on its face. And no statute of limitation could validate the tax deed to the other lots short of twenty-one years adverse occupation under the tax deed.

In the case of Asper *v.* Moon, 24 Utah, 241, 67 Pac., 410, such commingling of area in assessment, taxation and consideration in the deed makes the deed void.

We quote syllabus:

"Where a lot which had been sold to a city was assessed to private persons as a part of a number of contiguous lots owned by them, and the lots owned by the private parties were sold for taxes, without any deduction on account of the illegal assessment, such sale was *void*."

The strict rule of construction maintained as the law in the case at bar—if sustained by this court—would never permit the proof in a case after the term of the statute had expired, that the land was not taxable, that the land was not in the limits of the county in which it was taxed, that the treasurer whose name was signed
217 to the deed was actually dead at the date of the execution of the deed, that the treasurer had forfeited and lost his office at the date of the deed, and as in this case, that the title remained in the United States and was untaxable until a Receiver's Receipt was issued to some one of the contesting claimants to this Comstock Lode.

It never seems to have occurred to the Court of what the face of a tax deed imports; that the form of a tax deed is in every and all cases exactly alike, being prescribed by statute; that the only insertions by the treasurer must be the dates, the consideration, the description of the property and the execution. All errors, whether absolutely void and unbarred by the statute, or merely informalities voidable during the term of the statute, must occur in these insertions alone, and necessarily, from the nature of the case, the attack is confined exclusively to these insertions, which cover but a small portion of the face of the deed, and the court's inquiry must in all cases include identification of the land.

We submit that the court erred in assuming that the deed at bar was not void on its face as claimed by appellees and decided by Judge Palmer.

The Court in its opinion relies exclusively upon the case of Williams *v.* Conroy, 83 Pac., 959, Colo. Sup., and quotes extensively from that opinion to support the reversal of the decree and the direction for the entry of a judgment for appellant Wood.

When counsel first read and examined the Williams *v.* Conroy case, the statement and the opinion of the court led him to believe that the tax deed upheld was a voidable one for informalities and

irregularities only which would be cured by section 3904
218 Mills, and we accepted without question the statement of the court (p. 960), "that the plaintiff's tax deeds are regular and valid on their face, though because of informalities in the sale they are as a matter of law void."

We examined the abstract in the case as filed in this court and made the remarkable discovery that the tax deed was absolutely void on its face, and that Justices Campbell and Gunter, with Chief Justice Gabbert, had committed a glaring miscarriage of justice in reversing the decree below and entering judgment for the plaintiff.

On page 27 of the abstract in the case of Williams *vs.* Convoy, in the second paragraph of the stipulation, it appears that the tax sale occurred June 2nd, 1890, and that the tax deed was executed by the treasurer January 15th, 1893, being a period of four months and nineteen days before the period of three years redemption had expired. The first possible day upon which the treasurer of Las Animas County would have had any power to execute this deed would have been June 3rd or 4th, 1893.

The decree of Judge Northcutt in the Williams *vs.* Conroy case (p. 23 of Abstract, paragraph 2) expressly finds the same facts in the following language:

"That on or about the 2nd day of June, A. D. 1890, said property was sold for taxes by the treasurer of Las Animas County, and that thereafter and on or about the 15th day of January, A. D. 1893, the then treasurer of said county issued two certain treasurer's deeds purporting to convey said property under the tax sale."

219 Under the rule announced in Gomer *v.* Chaffee, 6 Colo., 317, the officer having no power to execute the deed until after June 2nd, 1893, the deeds upon the 15th of January, 1893, were premature and void. The tax deed bore on its face the evidence of this non-compliance with a substantial requisition of the law and was a nullity.

In Gomer *v.* Chaffee, 6 Colo., 317, Justice Elbert says:

"It is difficult to see how the statute of limitations can avail a defendant holding a *void* deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor the right of actual possession. The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of the law."

Citing—

Moore *v.* Brown, 11 Howard, 414;
Lane *v.* Shepardson, 18 Wis., 59;
Shoat *v.* Walker, 6 Kan., 73.

Not one line in the statement of the Williams-Conroy case or in the opinion of Justice Campbell betrays the fact that the treasurer of Las Animas County made this deed four months before he had power to do so; it was undoubtedly the sole reason why Judge Northcutt declared the tax deed void, and being the central turning

point of the case, as we say, the *crux* of the action, it was inexcusable for the court to refuse to mention and discuss it. The opinion of Judge Elbert in the Gomer-Chaffee case should have been re-
written in the Williams-Conroy case, and it would be what
220 the law is not only in this state but under all the decisions of the United States upon a similar state of facts.

We therefore challenge the authority of the Williams *v.* Conroy case and respectfully request this Honorable Court to disregard it, and to refuse to apply its authority in the decision of this case. One miscarriage does not justify the infliction of another miscarriage when the court is properly advised.

> "But man, proud man
> Drest in a little brief authority,
> Plays such fantastic tricks before high heaven
> As make the angels weep."

> "O, it is excellent
> To have a giant's strength; but it is tyrannous
> To use it like a giant."

In Seneca's "Happy Life" he writes:

"Injustice is as frequent a delivery from human tribunals as justice."

The rule of law is undisputed and universal: that where property that is untaxable and in which the title still remains in the United States, is incorporated and blended in its assessment and subsequent sale, the tax deed given is absolutely void for want of power and jurisdiction to make the sale.

Our contention is unassailable that under a tax deed so absolutely void as this one for numerous jurisdictional errors going to the power and authority of the officers to make the sale, no adverse possession of land can be acquired while the title is still in
221 the United States government, and that the short statute of limitations set up as a bar in this case by adverse constructive possession cannot commence to run against the owner until the patent issues.

Sec. 497, p. 634, Black on Tax Titles.

"Hence the statute will not run in favor of a deed which is void because the land was not taxable and the state had no power to tax it."

In our original brief, on pages 39 to 59, we have dwelt at large upon the following propositions:

Plea in Bar Five Year Limitation, Sec. 3904, M. A. S., not available to appellant.

1. Until patent issues for the land from the United States the statute cannot be pleaded.

2. Appellees have proved that no sale took place.

3. Deed being absolutely void for lack of power and jurisdiction in the offices to tax and to sell, statute does not run.

4. Statute does not run against Bill in Equity to quiet the title.

The first proposition, as above stated, is settled in the case of Redfield *vs.* Parks, 132 U. S., 239.

In this case the certificate of the Register of the Land Office—for the property in suit—was issued September 10th, 1856, and the land was paid for in full on that date. Tax deed was delivered August 11th, 1871, for tax sale of 1868. Patent issued April 15, 1875. Action for possession was brought April 11th, 1882.

222 Plea and defense of tax deed holder was the two-year and seven-year statute of limitation of the State of Arkansas. The Supreme Court of the United States held that although the action was brought over ten years and eight months after the delivery of the tax deed, and nearly seven years after the issuance of the patent, that a void deed could not create color of title which would bring the case within such statutes.

Justice Miller says (p. 241):

"It is apparent from the finding of the facts of the action, which was commenced on the 11th day of April, 1882, was within the seven years allowed by the statute of the time that the cause of action accrued, if that is to be computed from the 15th day of April, 1875, the date of the patent introduced by plaintiff. That such is the law in regard to the action of ejectment in the courts of the United States has been repeatedly decided. The foundation of this rule is the proposition that time does not run against the government; that no statute of limitation affects the rights of the government unless there is an express provision to that effect in the statute, and even then it cannot be conceded that State legislation can in this manner imperil the rights of the United States or overcome the general principle that it is not amenable to the statute of limitations or the doctrine of laches. The facts found in the present case leave it beyond question that the legal title to the property in controversy was in the United States until the issuing of the patent to the railroad company."

223 *Id.* "We think that both the weight of authority and sound principle are in favor of the proposition that when a deed founded on a sale for taxes is introduced in support of the bar of a possession under these statutes of limitations, it is of no avail if it can be seen upon its face, and by its own terms that it is absolutely void."

Citing—

Lindsey *v.* Miller, 6 Pet., 666;
Gibson *v.* Choteau, 13 Wall., 92;
Moore *v.* Brown, 11 How., 414;
Trustees Ky. Sem. *v.* Payne, 3 T. B. Mon., 121;
Waterson *v.* Devoe, 18 Kan., 223;
Shoat *v.* Walker, 6 Kan., 65;
Gomer *v.* Chaffee, 6 Colo., 314;
Mason *v.* Crowder, 85 Mo., 526, etc.

The Circuit and District Courts of the United States also hold that tax deeds and tax sales made of United States lands during the period of suspended entry and cancellation are void and the statute of limitations does not run until issue of patent.

Pitts *v.* Clay, 27 Fed., 635;
Coulter *v.* Stafford, 56 Fed., 564;
Bronson *v.* Keokuk, 3 Dill., 490.

The State courts hold the same:

Campbell *v.* Spears, 120 Iowa, 670;
Duncan *v.* Newcomer, 9 S. D., 375;
Scott *v.* Chickasaw Co., 46 Iowa, 253;
Reynolds *v.* Plymouth Co., 55 Iowa, 90;
224 Moriority *v.* Boone Co., 39 Iowa, 634;
Kohn *v.* Barr, 52 Kan., 269;
Calder *v.* Keegan, 30 Wis., 126.

Justice Campbell says, in Denver & R. G. R. R. Co. *v.* Wilson, 28 Colo., 14:

"The authorities are, that as between rival individual claimants of land acquired from the United States government, the statute of limitations does not begin to run in favor of an adverse claimant in possession as against an entryman until the latter, by a full compliance with the law, becomes entitled to a patent. This disposes of the plea of the bar of our statute, for the action was instituted within the period therein limited."

In Chicago & N. W. Ry. Co. *v.* Arnold, 114 Wis., 434:

"The land being exempt from taxation, there was a want of authority *ab initio* to set the machinery of taxation in motion, or in other words, there was no jurisdiction on the part of the taxing officers. Where such is the case, this court has held that there is nothing for a statute of limitations to act upon."

"Limitations do not run against one entitled to the legal title to government land until the patent by which it is granted is issued to him."

South End Min. Co. *v.* Tinney, 22 Nev., 228;
Steele *v.* Boley, 7 Utah, 66-67.

So also Supreme Court of California:

Dorn *v.* Baker, 96 Cal., 206.

"The statute of limitations did not begin to run until patent was issued, and there can be no pretense, therefore, that the cause of action was barred."
action was barred."

225 So also—

Manley *v.* Howlett, 55 Cal., 94.

Again—

Gardiner *v.* Miller, 47 Cal., 570.

"The statute of limitations of California has no application to the title of a patentee anterior to the issuance of the patent."

Sec. 927, Blackwell on Tax Titles, quoting Taylor *v.* Miles, 5 Kan., 498:

"The deed was held absolutely void on the ground that the land was not subject to taxation; and a distinction was taken between a deed void, or voidable for some irregularity merely, which it was admitted was sufficient to set the statute of limitations running, and one absolutely void, as in that case.

"This whole doctrine (it was said in this case) rests upon a constructive change of possession. * * * A void tax deed can neither create title nor draw to its holder the constructive possession of the property. It is void for all purposes. The original owner still continues to hold the absolute and paramount title, both in law and equity, and to hold constructive possession of the property."

In Breisch *v.* Cox, 81 Penn. St., 336, the Supreme Court of Pennsylvania say:

"The five years limitation in the Act of 1804 is not a bar to a recovery against a tax sale, void for want of jurisdiction."

"Land the title to which is in the general government is not taxable, and a purchaser at a tax sale of such land acquires no title thereto." Young *v.* Charnquist, 114 Iowa, 116.

226 This rule is absolutely unattacked in the decisions, that public lands are not taxable so long as a condition precedent to the acquisition of title from the United States by the grantee remains unfulfilled, and this rule has been strictly enforced in numerous cases of suspended and cancelled entries in the Land Department of the United States.

In the case of Campbell *v.* Spears, decided May 25th, 1903 (120 Iowa, 670), it is said:

"Where public land was sold for taxes assessed thereon against the entryman while a contest was pending before the United States Land Office, and before a patent was issued to another, during which time the land was not taxable, tax deeds issued in pursuance of such sales were void."

In Duncan *v.* Newcomer, 9 S. Dak., 373, it is said:

"Where a homestead entry on government land was changed into a cash entry, which was suspended, and the proof of residence finally rejected by the United States Land Department, necessitating the making of new proof thereafter, on which the patent issued, the land did not become taxable under state anthority until the second proof was made."

So also—

Hoskins *v.* Ill. Cent. R. Co., 78 Miss., 768.

We have claimed throughout our original brief, as was held by Judge Palmer in his decree below, that the defects in appellant's tax deed were vital and jurisdictional; that they were not mere irregularities which time or a statute of limitations could cure or validate.

227 In Brinker *v.* U. P., D. & G. R. Co., 11 Colo. App., 166, the court has said:

"A tax deed void in its inception will not support a plea of limitation under the Act of 1885 (2 Mills, Sec. 3904), which provides that no action for the recovery of land sold for taxes shall lie, unless it be brought within five years after the execution and delivery of a deed by the treasurer."

To claim that a constructive possession under a void tax deed would be a bar under Sec. 3904, M. A. S., this court must in some way pass upon the question of to what extent the cancellation of the entire mineral entry by the Commissioner of the Land Office August 7th, 1894, and so holding until December 21st, 1896, interrupts and destroys the constructive possession of appellant.

An inspection of appellant's tax deed shows that unentered, unpatented, untaxable government land, held by possessory rights, was included in the acreage described in the deed. This is a jurisdictional error so vital that it renders the tax deed void upon its face.

It has never been held in any decision, until the one handed down by Division No. 2 in this case, that a void deed so utterly beyond the jurisdictional power of the taxing officer to make, could by force of the validating effect of a statute of limitations, extinguish and bar the title of appellees. Any such statute would be absolutely unconstitutional and would deprive the appellees of their property without "due process of law," and contrary to the "law of the land."

Sec. 452, Black on Tax Titles, states the true rule:

228 "Any statute is unconstitutional which attempts to make a tax deed conclusive evidence as to jurisdictional facts, or facts vital to the exercise of the power of taxation or sale, as distinguished from such facts as are merely formal, or of routine, or pertaining to the regularity or the manner of the exercise of such power."

Citing—

Callahan *v.* Hurley, 93 U. S., 387, etc.

Id., 452: "So any statute which should attempt to cure such substantial defects, or should attempt to debar the owner from proving, in defense or assertion of his right, that a pretended tax sale was wanting in any of the essential pre-requisites, would violate the constitution and could not be enforced."

Section 368, Cooley's Constitutional Limitations, gives the reason of the rule, as follows:

"In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely; and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax

229 deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property"

Sec. 497, Black on Tax Titles, states the true rules when a void statute of limitations will not support the statute in the following language:

"The statute, it is said, applies only where the sale was made by virtue of some law, and not to cases where an inspection of the title shows that the sale was not made in conformity to any existing law. Hence the statute will not run in favor of a deed which is void because the land was not taxable and the state had no power to tax it."

We therefore respectfully pray that we be granted an oral argument in support of our petition to the Court sitting *en banc* for the transfer of the hearing of this cause from Division Two of the Supreme Court, to the Supreme Court sitting *en banc*, and that said petition be granted. And that appellee be granted a re-hearing of this cause for the errors set forth in this petition, and that the case be set for oral argument before the entire Bench of the Supreme Court sitting *en banc*, and that upon final hearing the decree and judgment below shall be affirmed.

Respectfully submitted, GEORGE R. ELDER,
Counsel Pro Se.

230 No. 4724.

In the Supreme Court of the State of Colorado.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY and CECILIA L. WAHRER, Appellant,

vs.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to SAMUEL MCMILLEN, Deceased, Appellees.

Petition for Transfer to Supreme Court en Banc.

George R. Elder, Counsel *Pro Se.*

Filed in Supreme Court, Jun- 13, 1906.
HORACE G. CLARK, *Clerk.*

231 In the Supreme Court of the State of Colorado.

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TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY and CECILIA L. WAHRER, Appellant,

vs.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to SAMUEL MCMILLEN, Deceased, Appellees.

Petition to Supreme Court en Banc.

Petition of Appellee George R. Elder for transfer of hearing of this cause from Division No. 2 of the Supreme Court, consisting of

Chief Justice Gabbert, Justices Gunter and Maxwell, to the full bench of the Supreme Court, sitting *en banc*, and for the setting aside of the decision of said Division No. 2, and for re-hearing of said cause by the full Bench sitting *en banc*.

For grounds of such transfer of the hearing, setting aside of the decision rendered, and for re-hearing of said cause by the full Bench sitting *en banc*, Appellee alleges:

232

I.

That the tax deed relied upon by Appellant to sustain the reversal of the decree obtained by Appellees in the Court below, involves the construction of Section twenty-five (25), Article two (2), Constitution of Colorado, which reads:

"That no person shall be deprived of life, liberty or property without due process of law,"

and involves the construction of Section one (1), Article five (5), Fifth Amendment of the Constitution of the United States, which reads:

"Nor be deprived of life, liberty or property, without due process of law."

That the Court below decided the tax sale based upon a publication and advertisement of notice of tax sale published exclusively on Sunday, was void because in violation and contravention of Sec. 25, Art. 2, Constitution of Colorado, and Sec. 1, Art. 5, Fifth Amendment Constitution of the United States, in that it deprived Appellee of his property without "due process of law," and according to the law of the land.

That under Sec. 5, Art. 6 of the Constitution of Colorado as amended, which reads

"And no case involving a construction of the Constitution of this State or of the United States shall be decided except by the Court *en banc*,"

Division No. 2 of this Court, consisting of Chief Justice Gabbert, Justices Gunter and Maxwell, were without jurisdiction and power to pass upon, construe, or decide a cause involving the con-

233 struction of Sec. 25, Art. 2, Constitution of Colorado, and Sec. one (1), Art. 5, Fifth Amendment, Constitution of the United States, and that such cause can only be considered by the entire Bench of the Supreme Court of Colorado, sitting *en banc*.

II.

That the decision handed down by this Division No. 2 of the Supreme Court, holding that unpatented, unentered mining locations held under the mining statutes of the United States, the title to which still remains in the United States, can be taxed and are taxable for other purposes than net output tax under the laws of the State of Colorado, is in violation of and in direct contravention of the second paragraph of the fourth section of the Enabling Act of Congress ap-

proved March 3rd, 1875, for the admission of the State of Colorado, which reads as follows:

"Secondly—That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain *at the sole and entire disposition of the United States,* and that the lands belonging to citizens of the United States residing without said State shall never be taxed higher than the lands belonging to residents thereof; *and that no taxes shall be imposed by the State on lands or property therein belonging to, or* which may hereafter be purchased by the United States."

234 III.

That the decision holding that Sec. 3904, Mills Ann. Sts., could validate by its terms a tax deed void for vital jurisdictional errors such as are present in this case, involved the construction of Sec. 25, Art. 2, Constitution of Colorado, and Sec. 1, Art. 5, Fifth Amendment, Constitution of the United States, and that the force and effect of said construction was the deprivation of the property of Appellees without due process of law and not according to the law of the land. That where such a construction of a Statute of Limitations attempts to make a tax deed conclusive evidence as to jurisdictional facts, or facts vital to the exercise of the power of taxation and sale, it becomes an unconstitutional confiscation of the property of the citizen.

That under Sec. 5, Art. 6 of the Constitution of Colorado as amended, which reads:

"And no case involving a construction of the Constitution of this State or of the United States shall be decided except by the Court *en banc,*"

Division No. 2 of this Court, consisting of Chief Justice Gabbert, Justices Gunter and Maxwell, were without jurisdiction and power to pass upon, construe or decide a cause involving the construction of Sec. 25, Art. 2, Constitution of Colorado, and Sec. 1, Art. 5, Fifth Amendment, Constitution of the United States, and that such cause can only be considered by the entire Bench of the Supreme
235 Court of Colorado sitting *en banc.*

Wherefore and for the reasons also set forth in the Petition of Appellee for a re-hearing in this case—

Appellee prays and petitions this Honorable Court, sitting *en banc,* to set aside the decision, opinion and judgment of Division No. 2 of this Court in this case; to transfer the hearing of said cause to the entire Bench of this Court sitting *en banc;* and to grant a re-hearing of this case to be heard and determined by the entire Bench of this Court sitting *en banc.* And Appellee further requests an oral argument upon this Petition for Transfer and upon the Petition for Re-Hearing in this case.

Respectfully submitted,

GEORGE R. ELDER,
Counsel Pro Se.

236 No. 4724.

TINGLEY S. WOOD, ETC., Appellant,
v.
ALICE J. McCOMBE, Administratrix of John McCombe, Deceased, *et al.*, Appellees.

Appeal from District Court of Lake County.

At this day this cause coming on to be heard upon the petition for transfer of cause to court *en banc*, and the court being fully advised in the premises, it is ordered and adjudged by the court that the petition be, and the same is hereby, denied.

237 No. 4724.

TINGLEY S. WOOD, ETC., Appellant,
v.
ALICE J. McCOMBE, Administratrix of John McCombe, Deceased, *et al.*, Appellees.

Appeal from District Court of Lake County.

At this day this cause coming on to be heard upon the petition for a rehearing herein, and the court being fully advised in the premises, it is ordered and adjudged by the court that the petition be, and the same is hereby, denied.

238 In the Supreme Court of the State of Colorado.

No. 4724.

TINGLEY S. WOOD (Impleaded with MARY M. BULLARD, ANNA L. FINNERTY and CECILIA L. WAHRER), Appellant,
vs.
ALICE J. McCOMBE, Administratrix of John McCombe, Deceased, ROWENA E. McCOMBE, by ALICE J. McCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

Petition for Time to File Petition for Citation for Writ of Error to the Supreme Court of the United States, and Assignment of Errors.

To the Honorable William H. Gabbert, Chief Justice of the Supreme Court of Colorado:

And now comes the Appellee, George R. Elder, Successor in Interest to Samuel McMillen, deceased, and prays that an order of this Honorable Court be entered in the above entitled case, granting

Appellee thirty (30) days' time to and until August 9th,
239 1906, in which to file his Petition for Citation for Writ of Error to the Supreme Court of the United States, and Assignment of Errors in said case.

GEORGE R. ELDER,
Attorney Pro Se.

Allowed July 9th, 1906.

(Endorsed:) No. 4724. In the Supreme Court of Colorado. Tingley S. Wood *et al.*, Appellants, *vs.* George R. Elder *et al.*, Appellees. Petition for Allowance of time to file Petition for Citation for Writ of Error to the Supreme Court of the United States, and Assignment of Errors. George R. Elder, Attorney *Pro Se.*

240 In the Supreme Court of the United States.

GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased; ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased, and ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, Plaintiffs in Error,

vs.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY and CECILIA L. WAHRER, Defendants in Error.

241 In the Supreme Court of the State of Colorado.

No. 4724.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY and CECILIA L. WAHRER, Appellant,

vs.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

Assignment of Errors.

And now comes the above named Plaintiff in Error, George R. Elder, Successor in Interest to Samuel McMillen, and for assignments of errors herein, says:

That in the record and proceedings in said cause, the Supreme Court of Colorado committed manifest error to the injury of this Plaintiff in Error, in the following particulars in this, to-wit:

242 First. That the Supreme Court of Colorado erred in reversing the judgment and decree of the District Court of the Fifth Judicial District in and for the County of Lake and State of Colorado, Peter L. Palmer sitting in place of Frank W. Owers, District Judge, and erred in directing the entry of judgment for appellant, Tingley S. Wood, for an undivided one-third (1/3) interest in the

Comstock Lode Mining Claim, United States Survey No. 3613, in this

That the forfeiture claimed by defendant under his tax deed of date August eighth (8th) 1892, of the property of Plaintiffs in Error, was not made by "due process of law" and under the "law of the land" and was in violation of and in direct contravention of Plaintiffs in Error's express right, title, privilege and immunity under Section Twenty-five (25) of Article Two (2) Constitution of Colorado, which reads: 'That no person shall be deprived of life, liberty or property without due process of law." And Section One (1) Article Five (5), being the Fifth (5th) Amendment to the Constitution of the United States, which reads: "Nor be deprived of life, liberty or property without due process of law."

And Section One (1) Article Fourteen (14), being the Fourteenth (14th) Amendment to the Constitution of the United States, which reads: "Nor shall any State deprive any person of life, liberty or property without due process of law."

That the judgment and decree of Judge Palmer in the Court below for Plaintiffs in Error, found that the notice of tax sale was published exclusively in the Sunday edition of the Leadville Herald Democrat and was not a legal notice of the sale; that Sunday is *Dies non Juridicus*, and the advertisement did not constitute "due process of law," was not a compliance with the statute; that a sale pursuant to such notice was void and vested no title in the purchaser, and the tax deed based on such void notice was absolutely void and no such sale took place; that the publication of a

243 tax-sale notice under the statutes of Colorado, is the fundamental step and pre-requisite in the process of law to deprive the citizen of his property for failure to pay taxes, and where this step is absolutely void, as in this case, all proceedings thereunder were without force or effect, and the sale thereunder passed no title, and that the County Treasurer was without jurisdiction, power and authority to offer said property for sale, to accept a bid, and to execute a deed for the same.

That the process being absolutely void, no such sale taking place, the taxing officers not having the power, authority and jurisdiction to sell the Comstock Lode, and the tax deed being void for vital jurisdictional errors, it could neither create title, set the Statute of Limitations, Section 3904 Mills' Annotated Statutes, running, nor draw to its holder the constructive possession of the property, there being nothing for the Statute to operate upon, nothing for it to run in favor of or against and nothing to set it in motion.

244 Second. That the Supreme Court of Colorado erred in reversing the judgment and decree of the court below, and directing the entry of judgment for appellant in this,

That the forfeiture and divestiture claimed by defendant under his Tax Deed of date August 8th, 1892, of the property of the Plaintiffs in Error was not made by " due process of law," and under the "law of the land," and was in violation of and in direct contravention of Plaintiffs in Error's express right, title, privilege and immunity under Section Twenty-five (25) of Article Two (2) of the Constitution of Colorado, and under Section One (1) Article Five

(5) being the Fifth (5th) Amendment to the Constitution of the United States, and under Section One (1) Article Fourteen (14) being the Fourteenth (14th) Amendment to the Constitution of the United States.

That the judgment and decree of the Court below for Plaintiffs in Error found:

That the Tax Deed showed upon its face the inclusion in the land conveyed of untaxable, unrented Government land, and was void upon its face and could not divest plaintiffs of their possessory right to the property.

That the Comstock Lode contained an area of nine and sixty-seven one hundredths (9.67) acres, as shown by the face of this Tax Deed, and that one and eighty one-hundredths (1.80) acres, a part of this area, was cancelled by letter of the Honorable Commissioner of the United States Land Office, dated May 2nd, 1887, which cancellation still remained in force and effect December 1st and 2nd, 1902, the days of trial; that under the laws of the State of Colorado, that portion of one and eighty one-hundredths (1.80) acres, the title remaining in the United States, was not taxable for the year 1888, nor could it be sold in the year 1889, and that the Deed was therefore void and could pass no title against the plaintiffs.

245 That the final cancellation of the whole Comstock Lode Mining Claim—being the entire Mineral Entry No. 2411, August 7th, 1894 and December 12th, 1894, rendered the entire claim untaxable and beyond the jurisdiction, power and authority of the officers of Lake County to assess, tax and sell as they attempted to do, from and after the date of original cancellation May 2nd, 1887; that the Comstock Lode not being taxable for the year 1888, the attempted taxation and sale thereof was absolutely void.

That the assessment and sale of the Comstock Lode was void and without jurisdiction in the officers, as the title to the land remained in the United States and was not taxable by the State of Colorado, or the County of Lake, and the equitable title was not fully vested in plaintiff's grantors, and there remained something to be done by the plaintiffs and the United States Government to establish the right and title of plaintiffs' grantors, and that the title to the Comstock Lode and a great part thereof, remaining in the United States, no statute of limitations could be pleaded against the United States and plaintiffs owners of the untaxable possessory pre-emption title; that the pendency of this adverse ejectment suit, as well as the pendency of the adverse ejectment suit of the Collins Lode *vs.* The Comstock Lode for two and five one-hundredths (2.05) acres of the area determined a large portion of this ground as unentered, untaxable mining ground, and that no Statute of Limitations could run against Plaintiffs until Patent issued.

246 Third: That the Supreme Court of Colorado erred in reversing the judgment and decree of the court below and directing the entry of judgment for appellant in this,—

That the forfeiture and divestiture claimed by defendant under his Tax Deed of date August 8th, 1892, of the property of plaintiffs in error, was not made by "due process of law" and under the "law

of the land," and was in violation of and in direct contravention of Plaintiffs' in Errors express right, title, privilege and immunity under Section Twenty-five (25) of Article Two (2) of the Constitution of Colorado, and under Section One (1) Article Five (5) being the Fifth (5th) Amendment to the Constitution of the United States and under Section One (1) Article Fourteen (14) being the Fourteenth (14th) Amendment to the Constitution of the United States.

That the judgment and decree of the court below for plaintiffs in error found:

That the Tax Deed showed upon its face in the consideration expressed the inclusion of illegal taxes assessed against untaxable, unentered land, and was void upon its face and could not divest plaintiffs of their possessory right to this property.

That the total consideration of One Dollar and thirty-eight cents ($1.38) included illegal taxes upon government land of the United States for which no Receiver's Receipt was issued.

That the Comstock Lode contained an area of nine and sixty-seven one-hundredths (9.67) acres, as shown by the face of this tax deed, and that one and eighty one-hundredths (1.80) acres—a part of this area—was cancelled by letter of the Honorable Commissioner of the United States Land Office, dated May 2nd, 1887, which cancellation still remained in force and effect December 1st and 2nd, 1902, the days of trial; that under the laws of the State of Colorado, that portion of one and eighty one-hundredths (1.80)
247 acres, the title remaining in the United States, was not taxable for the year 1888, nor could it be sold in the year 1889, and that the deed was therefore void and could pass no title against the plaintiffs.

That the final cancellation of the whole Comstock Lode Mining Claim—being the entire Mineral Entry No. 2411 August 7th, 1894 and December 12th, 1894—rendered the entire claim untaxable and beyond the jurisdiction, power and authority of the officers of Lake County to assess, tax and sell as they attempted to do; from and after the date of original cancellation May 2nd, 1887, that the Comstock Lode not being taxable for the year 1888, the attempted taxation and sale thereof was absolutely void.

That the United States still owning the fee to the land while the entry remained cancelled, it could not be taxed and sold.

That while part of the claim was still owned by the United States after the cancellation, the incorporation of illegal taxes upon this part with other taxes levied upon the other part of the claim, rendered the whole sale void *in toto*.

That the title to the Comstock Lode and a great part thereof remaining in the United States, no Statute of Limitations could be pleaded against the United States and plaintiffs owners of the untaxable possessory pre-emption title.

That the pendency of this adverse ejectment suit, as well as the pendency of the Adverse ejectment suit of the Collins Lode *vs.* the Comstock Lode for two and five one-hundredths (2.05) acres of its area, determined a large portion of this ground as unentered, untaxable mining ground, and that no Statute of Limitations could run -gainst Plaintiffs until Patent issued.

That the assessment and sale of the Comstock Lode was void and without jurisdiction in the officers, as the title to the land remained in the United States and was not taxable by the State of Colorado, or the County of Lake, and the equitable title was
248 not fully vested in plaintiffs' grantors, and there remained something to be done by the Plaintiffs and the United States Government to establish the right and title of plaintiffs' grantors.

249 Fourth: That the Supreme Court of Colorado erred in reversing the judgment and decree of the Court below and directing the entry of judgment for appellant, and in holding and assuming to hold that unpatented, unentered mining locations held under the mining statutes of the United States, the title to which still remains in the United States, can be taxed and are taxable for other purposes than net output tax under the laws of Colorado, and especially under the Act of April 4th, 1887. Mills' Annotated Statutes, Sections 3224 to 3226. And in holding that the unentered, unpatented area of the Comstock Lode the property of the Plaintiffs in Error was taxable under the laws of the State of Colorado, and especially under the Act of April 4th, 1887, Mills' Annotated Statutes, Sections 3224 to 3226, for the year 1888.

That such holding and construction of the Laws of the State of Colorado and especially of the Act of April 4th, 1887, Session Laws of 1887, pp. 340–342, Mills' Annotated Statutes Sections 3224 to 3226, by the Supreme Court of Colorado, is in violation of and in direct contravention of the second paragraph of the Fourth (4th) Section of the Enabling Act of Congress, approved March 3rd, 1875, for the admission of the State of Colorado, as follows:

"Secondly. That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory and that the same shall be and remain *at the sole and entire disposition of the United States*, and that the lands belonging to citizens of the United States residing without said State shall never be taxed higher than the lands belonging to residents thereof; *and that no taxes shall be imposed by the State on lands or property therein belonging to*, or which may hereafter be purchased by *the United States.*"

250 That the decision of the Supreme Court of Colorado, sustaining and upholding such construction and interpretation of the laws of Colorado, and especially the Act of April 4th, 1887, Session Laws of 1887, pages 340–342, Mills' Ann. Sts., Secs. 3224 to 3226, was in violation of and in direct contravention of, and a denial of and against the title, right, privilege and immunities claimed by Plaintiffs in Error under the Second Paragraph of the Fourth Section of the Enabling Act of Congress, approved March 3rd, 1875, for the admission of the State of Colorado, 18 U. S. Statutes at Large, 474.

The court below found that as the title to the Comstock Lode and a large part thereof remained in the United States at the date of trial December 1st and 2nd, 1902, and as by the Act of Congress of March 3rd, 1875, 18th U. S. Statutes at Large, 474, admitting Colo-

rado into the Union as a State, it was provided: "that no taxes shall be imposed by the State on lands or property therein belonging to, or which may hereafter be purchased by the United States." The taxes attempted to be levied upon said Comstock Lode for the year 1888 were illegal and void because levied in violation of that Act of Congress.

The court below by its judgment and decree found:

That the preliminary cancellation of one and eighty one-hundredths (1.80) acres of the Comstock Claim May 2nd, 1887, by the Commissioner of the General Land Office, and the final cancellation of the entire Comstock Lode Mineral Entry No. 2411, August 7, 1894, and December 12, 1894, rendered the entire claim untaxable and beyond the jurisdiction, power and authority of the officers of Lake County to assess, tax and sell, as they attempted to do; and the court's judgment and decree for plaintiffs in error was based upon the fact that the deed showed upon its face a total area of nine and sixty-seven one-hundredths (9.67) acres; that the title to one and eighty one-hundredths (1.80) acres of this area remained
251 in the United States, and was claimed by other parties than the parties to this suit, being also claimed by T. J. Cash, W. H. Havens and Jerry Collins, claimants of the Collins Lode, for which they instituted an adverse suit September 18th, 1897, in the District Court of Lake County, being No. 5025 of the docket of this same court, in support of their adverse claim of the Collins Lode *vs.* the Comstock Lode, filed in the United States Land Office at Leadville, August 20th, 1897, and still pending and undetermined; and that the property was therefore untaxable for the year 1888 under the Statutes of Colorado; that the deed showed in its consideration that it included illegal taxes blended in the consideration expressed, upon Government land of the United States for which no Receiver's Receipt was issued and the deed based on such consideration was void, and that the County Treasurer was without power to include in the area conveyed by defendant's deed Government land which was still owned by the United States.

That no Statute of Limitations could cure the void deed of defendant in error, or could be interposed in his behalf, for the reason that such statute could not run against the United States and as between conflicting claimants to unentered public domain of the United States. The Statute of Limitations could not commence to run until after Patent issued for the property.

252 Fifth: That the Supreme Court of Colorado erred in reversing the judgment and decree of the court below and directing the entry of judgment for appellant in holding and deciding that that Section 3904 Mills Annotated Statutes, the five year statute of limitations, was a bar to the action of plaintiffs in error, and could validate by its terms a tax deed void for vital jurisdictional errors, where the process was entirely void, where the land was not subject to taxation being unentered, unpatented government land, and where there was no sale.

That such holding and construction of the laws of Colorado, and especially Section 3904 Mills Annotated Statutes, which reads: "No

action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding," was in violation of and in direct contravention of plaintiffs in error's express right, title, privilege and immunity under Scetion Twenty-five (25) of Article Two (2) of the Constitution of Colorado, and under Section One (1) Article Five (5) being the Fifth (5th) Amendment to the Constitution of the United States, and under Section One (1) Article Fourteen (14), being the Fourteenth (14th) Amendment to the Constitution of the United States.

That the force and effect of the said construction of Section 3904 was the deprivation of the property of plaintiffs in error, without due process of law and not according to the law of the land.

That where such a construction of a statute of limitations attempts to make a tax deed conclusive evidence as to jurisdictional facts or facts vital to the exercise of the power of taxation and sale, it becomes an unconstitutional confiscation of the property of the citizen.

253 Sixth: That the Supreme Court of Colorado erred in holding and deciding that Section 3902 Mills Annotated Statutes of Colorado could validate by its terms a tax deed void for vital jurisdictional errors where the process was entirely void, where the land was not subject to taxation, being unentered, unpatented government land, and where there was no sale.

That such holding was in violation and contravention of Section Twenty-five (25) Article Two (2) of the Constitution of Colorado, and under Section One (1) Article Five (5) being the Fifth (5th) Amendment to the Constitution of the United States, and under Section One (1) Article Fourteen (14), being the Fourteenth (14th) Amendment to the Constitution of the United States, and was a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error under the Second Paragraph of the Fourth Section of the Enabling Act of Congress approved March 3rd, 1875, for the admission of the State of Colorado, 18 U. S. Statutes at Large, 474.

254 Seventh: That the Supreme Court of Colorado erred in reversing the judgment and decree of the court below, and in holding and deciding that the Comstock Lode was subject to assessment and taxation in the year 1888 under Section 3222-3225 Mills Annotated Statutes.

255 Eighth: That the Supreme Court of Colorado erred in reversing the judgment and decree of the court below, and in deciding that the Comstock Lode was subject to tax sale in the year 1889.

256 Ninth: The Supreme Court of Colorado erred in holding that the tax deed of the Comstock Lode issued by the County Treasurer August 8th, 1892 was authorized.

257 Tenth: The Supreme Court of Colorado erred in its holding that said Tax Deed was valid upon its face, and was *prima facie* evidence of the matters stated in Section 3902 Mills Annotated Statutes, and that the title and right of possession of plaintiffs in error was vested in appellant.

258 Eleventh: The Supreme Court of Colorado erred in its decision and holding that the statute of limitations of five years (Section 3904) was a bar to the recovery of the title of plaintiffs in error.

259 Twelfth: The Supreme Court of Colorado erred in reversing the judgment and decree of the court below, which held that as between rival individual claimants of land acquired from the United States Government, the Statute of Limitations does not begin to run in favor of an adverse claimant as against an entryman until the latter, by a full compliance with the law, becomes entitled to a patent.

260 Thirteenth: The Supreme Court of Colorado erred in reversing the judgment and decree of the court below, that the claim of appellant to the constructive possession of the Comstock Lode under his Tax Deed of August 8th, 1892, was interrupted and destroyed by the entire cancellation of the Comstock Lode and its Mineral Entry by the Commissioner of the General Land Office, and that the Statute of Limitations could not run as against Plaintiffs in Error.

261 Fourteenth: The Supreme Court of Colorado erred in holding that an actual sale of the Comstock Lode took place.

262 Fifteenth: The Supreme Court of Colorado erred in holding that the Statute of Limitations of five years could avail a Tax Deed conveying unentered, untaxable Government land.

263 Sixteenth: The Supreme Court of Colorado erred in reversing the judgment and decree of the Court below, which held that the Tax Deed of Appellant was absolutely void for complete lack of power and jurisdiction in the officers to tax and to sell, and that the Statute of Limitations did not run in favor of Appellant.

264 Seventeenth: The Supreme Court of Colorado erred in reversing the judgment and decree of the Court below, which held that the Tax Deed of Appellant to a One-third (1/3) interest in the Comstock Lode was void and vested no title in Appellant.

265 Eighteenth: The Supreme Court of Colorado erred in directing a judgment to be entered for Appellant; that such finding is contrary to the evidence adduced in the case.

266 Nineteenth: The judgment and finding of the Supreme Court of Colorado is contrary to the law.

267 Twentieth: The Supreme Court of Colorado erred in refusing the Petition of Plaintiffs in Error for the transfer of this cause for hearing from Division No. 2, consisting of Chief Justice Gabbert, Justices Gunter and Maxwell, to the entire bench of the Supreme Court sitting *En Banc,* under Section Five (5) Article Six (6) of the Constitution of Colorado, as amended which reads:

"And no case involving a construction of the Constitution of the State or of the United States, shall be decided except by the Court *En Banc.*"

That in reversing the decree and judgment in the court below, Divsion No. 2 of the Supreme Court of Colorado, consisting of three judges, assumed jurisdiction to construe Section Twenty-five (25)

of Article Two (2) of the Constitution of Colorado, and of Section One (1) Article Five (5), being the Fifth (5th) Amendment of the Constitution of the United States, and of Section One (1), Article Fourteen (14), being the Fourteenth Amendment to the Constitution of the United States.

That such assumption of jurisdiction was in disregard of, in conflict with, and in violation of the last paragraph of Section Five (5) of Article Six (6) of the Constitution of Colorado as amended.

That in so holding the Supreme Court of Colorado acted in violation of and in contravention of the rights, privileges and immunities of Plaintiff- in Error under Section 25 Article Two (2) Constitution of Colorado, and Section One (1), Article Five (5), being the Fifth (5th) Amendment of the Constitution of the United States, and Section One (1) Article Fourteen (14), being the Fourteenth Amendment of the Constitution of the United States.

268 Twenty-first: The Supreme Court of Colorado erred in holding that the short statute of limitations Section 3904 Mills Annotated Statutes, could run against a Bill in Equity to quiet title under a void tax deed.

269 Twenty-second: The Supreme Court of Colorado erred in not affirming the judgment and decree of the court below in favor of Plaintiffs in Error, and against Appellant.

270 Wherefore, The said Plaintiffs in Error pray that the judgment of the Supreme Court of Colorado aforesaid may be reversed, annulled and altogether held for nothing, and that the Judgment and Decree in favor of the Plaintiffs in Error in the District Court of the Fifth Judicial District of Colorado be affirmed, and that they may be restored to all things which they have lost by occasion of the judgment of said Supreme Court of the State of Colorado.

(Signed) GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

(Endorsed:) No. 4727 United States of America, In the Supreme Court of the United States. George R. Elder *et al.*, Plaintiffs in Error, *vs.* Tingley S. Wood, Defendants in Error. Assignment of Errors to the Judgment of the Supreme Court of Colorado. Filed in Supreme Court Aug. 6, 1906. (Signed) Horace G. Clark, Clerk. George R. Elder, Attorney for Plaintiffs in Error.

271 In the Supreme Court of the United States.

No. 4724.

GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased; ALICE J. McCOMBE, Administratrix of John McCombe, Deceased, and ROWENA E. McCOMBE, by ALICE J. McCOMBE Her Next Friend, Plaintiffs in Error,

vs.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, Defendants in Error.

In the Supreme Court of the State of Colorado.

Being Entitled TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, Appellants,

vs.

ALICE J. McCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. McCOMBE, by ALICE J. McCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

272 *Petition for Citation for Writ of Error to the Supreme Court of the United States.*

To the Honorable William H. Gabbert, Chief Justice of the Supreme Court of Colorado:

And now comes the above entitled plaintiffs in error and say that there is manifest error in the record and proceedings herein, of which the Supreme Court of the United States has jurisdiction, as shown by an assignment of errors filed herein, and pray that a writ of error be allowed commanding the said Supreme Court of the State of Colorado to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States; and the said plaintiffs in error further pray that, upon filing a bond for damages and costs in the sum of One Thousand ($1000) Dollars, an order entered that said writ of error shall issue until further order of the Supreme Court of the United States in the premises.

GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

(Endorsed:) No. 4724. United States of America in the Supreme Court of the United States. George R. Elder *et al.*, Plaintiffs in Error *vs.* Tingley S. Wood, Defendants in Error. Petition for Writ of Error from the Judgment of the Supreme Court of Colorado. Filed in Supreme Court, Aug. 6, 1906. Horace G. Clark, Clerk. George R. Elder, Attorney for Plaintiffs in Error.

273 UNITED STATES OF AMERICA, *State of Colorado, ss:*

In the Supreme Court of the State of Colorado.

No. 4724.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, Appellants,

vs.

ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

Order of Allowance of Writ of Error to Supreme Court of the United States.

Upon presentation of the petition and assignments of error of Alice J. McCombe, Administratrix of John McCombe, deceased, Rowena E. McCombe, by Alice J. McCombe, her next friend, and George R. Elder, successor in interest to Samuel McMillen, deceased, plaintiffs in error, for a writ of error in the above entitled case to the Supreme Court of the United States, the said petition is hereby granted and it is ordered that a writ of error be allowed to the Supreme Court of the United States, the bond in the penal sum of one thousand dollars ($1,000) herewith presented being approved.

In testimony whereof, witness my hand this 6th day of August, A. D. 1906.

WILLIAM H. GABBERT,
Chief Justice of the State of Colorado.

274 (Endorsed:) No. 4724. In the Supreme Court of the State of Colorado. Tingley S. Wood *et al.*, appellants, *vs.* Alice J. McCombe *et al.*, appellees. Order of Allowance of writ of Error to Supreme Court of the United States. Filed in Supreme Court Aug. 6, 1906, Horace G. Clark, Clerk. George R. Elder, Attorney for plaintiffs in error.

275 UNITED STATES OF AMERICA, *State of Colorado, ss:*

In the Supreme Court of the United States.

GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased; ALICE J. McCOMBE, Administratrix of John McCombe, Deceased, and ROWENA E. McCOMBE, by ALICE J. McCOMBE, Her Next Friend, Plaintiffs in Error,

vs.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, Defendants in Error.

Citation for Writ of Error to Supreme Court of the United States.

To Tingley S. Wood, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error allowed by the Supreme Court of the State of Colorado to the Supreme Court of the United States, wherein George R. Elder, successor in interest to Samuel McMillen, deceased, Alice J. McCombe, administratrix of John McCombe, deceased, and Rowena E. McCombe, by Alice J. McCombe, her next friend, *all* plaintiffs in error, and you, Tingley S. Wood (impleaded with Mary M. Bullard, Anna L. Finnerty and Cecilia L. Wahrer) are defendants in error, to show cause, if any there be, why the judgment rendered against the said plain-
276 tiffs in error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Gabbert, Chief Justice of the Supreme Court of the State of Colorado this 6th day of August, A. D. 1906.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of the State of Colorado.

(Endorsed:) No. 4724. In the Supreme Court of the United States. George R. Elder, *et al.*, plaintiffs in error, *vs.* Tingley S. Wood *et al.*, Defendants in error. Citation for Writ of Error to the Supreme Court of the United States. Filed in Supreme Court, Aug. 6, 1906, Horace G. Clark, clerk. George R. Elder, Attorney for plaintiffs in error.

277 *Proof of Service.*

THE UNITED STATES OF AMERICA, *State of Colorado, ss:*

GEORGE R. ELDER ET AL., Plaintiffs in Error,

vs.

TINGLEY S. WOOD ET AL., Defendants in Error.

On this 8th day of August, A. D. 1906, Charles Cavender, Esq., counsel for defendant in error, Tingley S. Wood, does hereby

acknowledge that he has received a true copy of the foregoing citation, and duly accepts service thereof as the attorney of record of the said Tingley S. Wood.

CHAS. CAVENDER,
Attorney for Defendant- in Error.

(Endorsed:) No. 4724. The United States of America, State of Colorado, ss. George R. Elder *et al.*, Plaintiffs in error, *vs.* Tingley S. Wood *et al.*, Defendants in error. Proof of Service of Citation for writ of error to the Supreme Court of the United States. Filed in Supreme Court Aug. 10th, 1906. Horace G. Clark, Clerk. George R. Elder, Attorney for plaintiffs in Error.

278 In the Supreme Court of the State of Colorado.

No. 4724.

TINGLEY S. WOOD (Impleaded with MARY H. DULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER), Appellants,
vs.
ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased; ROWENA E. MCCOMBE, by ALICE MCCOMBE, Her Next Friend, and GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, Appellees.

It is hereby stipulated by and between Charles Cavender, Esq., counsel for appellants, and George R. Elder, counsel for appellees in the above entitled case, that the bond on writ of error and appeal to the Supreme Court of the United States shall be placed at the sum of one thousand ($1,000.00) dollars, and such an order may be entered by the Supreme Court.

Dated August 1st, 1906.

CHAS. CAVENDER,
Counsel for Appellants.
GEORGE R. ELDER,
Counsel for Appellees.

(Endorsed:) No. 4724. In the Supreme Court of the State of Colorado. Tingley S. Wood *et al.*, Appellants, *vs.* Alice J. McCombe *et al.*, Appellees. Stipulation that bond on writ of error may be placed at $1,000. Filed in Supreme Court Aug. 6, 1906, Horace G. Clark, Clerk. George R. Elder, counsel for appellees.

279 Know all men by these presents That we, George R. Elder, as principal, and Ida D. Elder, as surety, are held and firmly bound unto Tingley S. Wood in the full and just sum of one thousand ($1,000) dollars, to be paid to the said Tingley S. Wood, his certain attorney, heirs and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 1st day of August, in the year of our Lord one thousand nine hundred and six (1906).

Whereas, lately at a term of the Supreme Court of the State of Colorado, in a suit pending in said court between Tingley S. Wood (impleaded with Mary M. Bullard, Anna L. Finnerty and Cecilia L. Wahrer) appellants, and George R. Elder, successor in interest to Samuel McMillen, deceased, and Alice J. McCombe, administratrix of John McCombe, deceased, Rowena E. McCombe, by Alice J. McCombe, her next Friend, appellees, a judgment was rendered against the said George R. Elder, successor in interest to Samuel McMillen, deceased, and Alice J. McCombe, administratrix of John McCombe, deceased, Rowena E. McCombe, by Alice J. McCombe, her next friend; and the said George R. Elder, successor in interest to Samuel McMillen, deceased, and Alice J. McCombe, administratrix of John McCombe, deceased, Rowena E. McCombe, by Alice J. McCombe, her next friend, having obtained a writ of error issued by the Honorable William H. Gabbert, Chief Justice of the Supreme Court of Colorado, to reverse the judgment in the aforesaid suit and a citation directed to the said Tingley S. Wood (impleaded with Mary M. Bullard, Anna L. Finnerty and Cecilia L. Wahrer) citing and admonishing him to be and appear at the Supreme Court of the United States at Washington, within thirty (30) days from the date hereof.

280 Now the condition of the above obligation is such, that if the said George R. Elder, successor in interest to Samuel McMillen, deceased, and Alice J. McCombe, administratrix of John McCombe, deceased, Rowena E. McCombe, by Alice J. McCombe, her next friend, shall prosecute said writ of error to effect and answer all damages and costs, interests &c. for the delay, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

GEORGE R. ELDER. [SEAL.]
IDA D. ELDER. [SEAL.]

Approved by
WILLIAM H. GABBERT,
Chief Justice of the State of Colorado.

August 1st, 1906.

I hereby consent to the above bond as signed and approve the security.

CHAS. CAVENDER,
Counsel for Appellant, Defendant in Error.

(Endorsed:) No. 4724. In the Supreme Court of the United States. George R. Elder *et al.*, Plaintiffs in error, *vs.* Tingley S. Wood *et al.*, Defendants in error. Bond on Writ of Error and appeal to Supreme Court of the United States. Filed in Supreme Court Aug. 6, 1906. Horace G. Clark, Clerk. George R. Elder, attorney for plaintiffs in error.

281 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the Supreme Court of the State of Colorado before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between George R. Elder, successor in interest to Samuel McMillen, deceased, Alice J. McCombe, administratrix of John McCombe, deceased, and Rowena E. McCombe, by Alice J. McCombe, her next friend, plaintiffs in error, and Tingley S. Wood, impleaded with Mary M. Bullard, Anna L. Finnerty and Cecilia L. Wahrer, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said *State*, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said George R. Elder, successor in interest to Samuel McMillen, deceased, Alice J. McCombe, administratrix of John McCombe, deceased, and Rowena E. McCombe, by Alice J. McCombe, her next friend, plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be
282 duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of the said Circuit Court at the City and County of Denver in said district, this sixth day of August, A. D. 1906, and of the Independence of the United States the 131st year.

[Seal U. S. Circuit Court.]

CHARLES W. BISHOP, *Clerk.*

Allowed by

WILLIAM H. GABBERT,

Chief Justice, Supreme Court of the State of Colorado.

(Endorsed:) Filed in Supreme Court, Aug. 6, 1906, Horace G. Clark, Clerk.

283 *Return.*

THE UNITED STATES OF AMERICA, *State of Colorado, ss:*

In obedience to the command of the within writ of error I herewith transmit to the honorable, the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court of the State of Colorado at Denver, this 10th day of August, A. D. 1906.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of Colorado,
By CORNELIUS WESTERVELT, *Dep'ty.*

284 UNITED STATES OF AMERICA, *State of Colorado, City and County of Denver, ss:*

I, Horace G. Clark, Clerk of the Supreme Court of the State of Colorado, do hereby certify the above and foregoing pages numbered in folios from 1 to 640 both inclusive, to be a true, perfect and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court,—transcript of record, bill of exceptions, judgment of Supreme Court, opinion of supreme court, petition for rehearing, judgment of supreme court denying same, petition for transfer to court *en banc*, judgment of supreme court denying same, assignment of errors, petition for writ of error, bond, citation for writ of error, allowance of writ of error, writ of error and return, proof of service, in a certain cause lately in said court pending wherein Tingley S. Wood, (impleaded with Mary M. Bullard, Anna L. Finnerty and Cecelia L. Wahrer,) were appellants and Alice J. McCombe, Administratrix of John McCombe, deceased, Rowena E. McCombe, by Alice J. McCombe, her Next Friend, and George R. Elder, Successor in Interest to Samuel McMillen, deceased, were Appellees, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above, I do hereunto sign my name and affix the Seal of said Court at Denver in said State of Colorado, this 10th, day of August, A. D. 1906.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of Colorado,
By CORNELIUS WESTERVELT, *Dep'ty.*

285 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the Supreme Court of the State of Colorado before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between George R. Elder, successor in interest to Samuel McMillen, deceased, Alice J. McCombe, administratrix of John McCombe, deceased, and Rowena E. McCombe, by Alice J. McCombe, her next friend, Plaintiffs in Error, and Tingley S. Wood, impleaded with Mary M. Bullard, Anna L. Finnerty and Cecilia L. Wahrer, Defendants in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said George R. Elder, Successor in interest to Samuel McMillen, deceased, Alice J. McCombe, Administrartix of John McCombe, deceased, and Rowena E. McCombe, by Alice J. McCombe, her next friend, Plaintiffs in Error, as by their complaint appears.

286 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit Court, at the City and County of Denver, in said district, this sixth day of August, A. D. 1906, and of the Independence of the United States the 131st year.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Allowed by

WILLIAM H. GABBERT,

Chief Justice Supreme Court of the State of Colorado.

287 *Return.*

THE UNITED STATES OF AMERICA, *State of Colorado, ss:*

In obedience to the command of the within Writ of Error, I herewith transmit to the Honorable, the Supreme Court of the United States the original writ of error and with the duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the Seal of the Supreme Court of the State of Colorado, at Denver, this 10th day of August, A. D. 1906.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of Colorado,
By CORNELIUS WESTERVELT, *Deputy.*

288 [Endorsed:] Filed in Supreme Court, Aug. 6 1906 Horace G. Clark, Clerk.

289 In the Supreme Court of the United States.

No. —.

GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased; ALICE J. MCCOMBE, Administratrix of John McCombe, Deceased, and ROWENA E. MCCOMBE, by ALICE J. MCCOMBE, Her Next Friend, Plaintiffs in Error,

vs.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY, and CECILIA L. WAHRER, Defendants in Error.

To James H. McKenney, Esq., clerk of Supreme Court of the United States:

Plaintiffs in Error by their Counsel, George R. Elder, do hereby designate the following parts and portions of the Record to be printed in the Transcript of Record:

1 Folios 1 & 2.
2 Folios 16 to 38 Inclusive of Decree.
3 Folios 39 to 54 Inclusive Complaint & Summons.
4 Folios 57 to 109 Inclusive Answer & Replication.
5 Folios 128 to 136 Inclusive Bond on Appeal to Supreme Court of Colorado.
6 Folios 140–150 Inclusive plff's Ex. A.

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7 Folios 151–157 Plff's Ex. B.
8 Folios 158–162 Plff's Ex. C.
9 Folios 167–171 Plff's Ex. D.
10 Folios 174–181 Plff's Ex. E.
11 Folios 185.

12 Folios 186–208 Plff's Ex. F & G.
13 Folios 209–216.
14 Folios 217–232 Inc. Def'ts Ex. 1 Tax Deed to Chas. T. Carnahan.
15 Folios 233–242 Inc. Def'ts Ex. 2.
16 Folios 243–247 Inc. Def'ts Ex. 3.
17 Folios 248–256 Inc. Def'ts Ex. 4.
18 Folios 282–283.
19 Folios 286–302 Inc. Plff's Exh'b's Nos. H & I, Letters of Commissioners of General Land Office.
20 Folios 303–312 Inc. Plff's Ex. Files Herald Democrat, Tax Notice and Ex. J.
21 Folios 353–358 Inc. Tax Sale Certificate No. 1033, Plff's Ex. X.
22 Folios 358–366 Inc. Plff's Ex. Y.
23 Folios 367–376 Inc. Plff's Ex. Z.
24 Folios 377–384 Inc.
25 Folios 401–404 Inc.
26 Folios 405–642 Inc.

That the above and foregoing parts and portions of the Record contain a statement of the errors relied upon by the Plaintiffs in Error, and also contain all the parts of the Record necessary for the consideration thereof.

Dated Leadville, Colorado, August 23rd, 1906.

GEORGE R. ELDER,
Counsel for Plaintiffs in Error.

291 I hereby consent on behalf of Defendants in Error that the above designation contains all those parts of the Record material for the consideration of this case.

Dated Leadville, Colorado, August 23, 1906.

CHAS. CAVENDER,
Counsel for Defendants in Error.

292 [Endorsed:] No. —. In the Supreme Court of the United States. George R. Elder *et al.*, *vs.* Tingley S. Wood *et al.* Designation of Parts of Record For Printing In Transcript. George R. Elder, Counsel for Plff's In Error.

293 [Endorsed:] File No. 20358. Supreme Court U. S. October Term, 1906. Term No. 393. George R. Elder &c. *et al.*, Plff's in Error, *vs.* Tingley S. Wood impleaded &c. Designation by plff's in error of parts of record to be printed and consent thereto. Filed Sept. 6, 1906.

Endorsed on cover: File No. 20,358. Colorado supreme court. Term No. 393. George R. Elder, successor in interest to Samuel McMillen, deceased; Alice J. McCombe, administratrix of John McCombe, deceased, and Rowena E. McCombe, by Alice J. McCombe, her next friend, plaintiffs in error, *vs.* Tingley S. Wood, impleaded with Mary M. Bullard, Anna L. Finnerty, and Cecelia L. Wahrer. Filed September 6, 1906. File No. 20,358.

In the Supreme Court,

October Term, 1894.

No. 95.

GEORGE R. ELDER, Successor of Executors of [illegible] McMILLAN, Deceased, and ALICE J. McCOMBS, Administratrix of JOHN McCOMBS, Deceased, and MARGARET A. E. McCOMBS and ALICE J. McCOMBS, Her Next Friend,

Plaintiffs in Error,

vs.

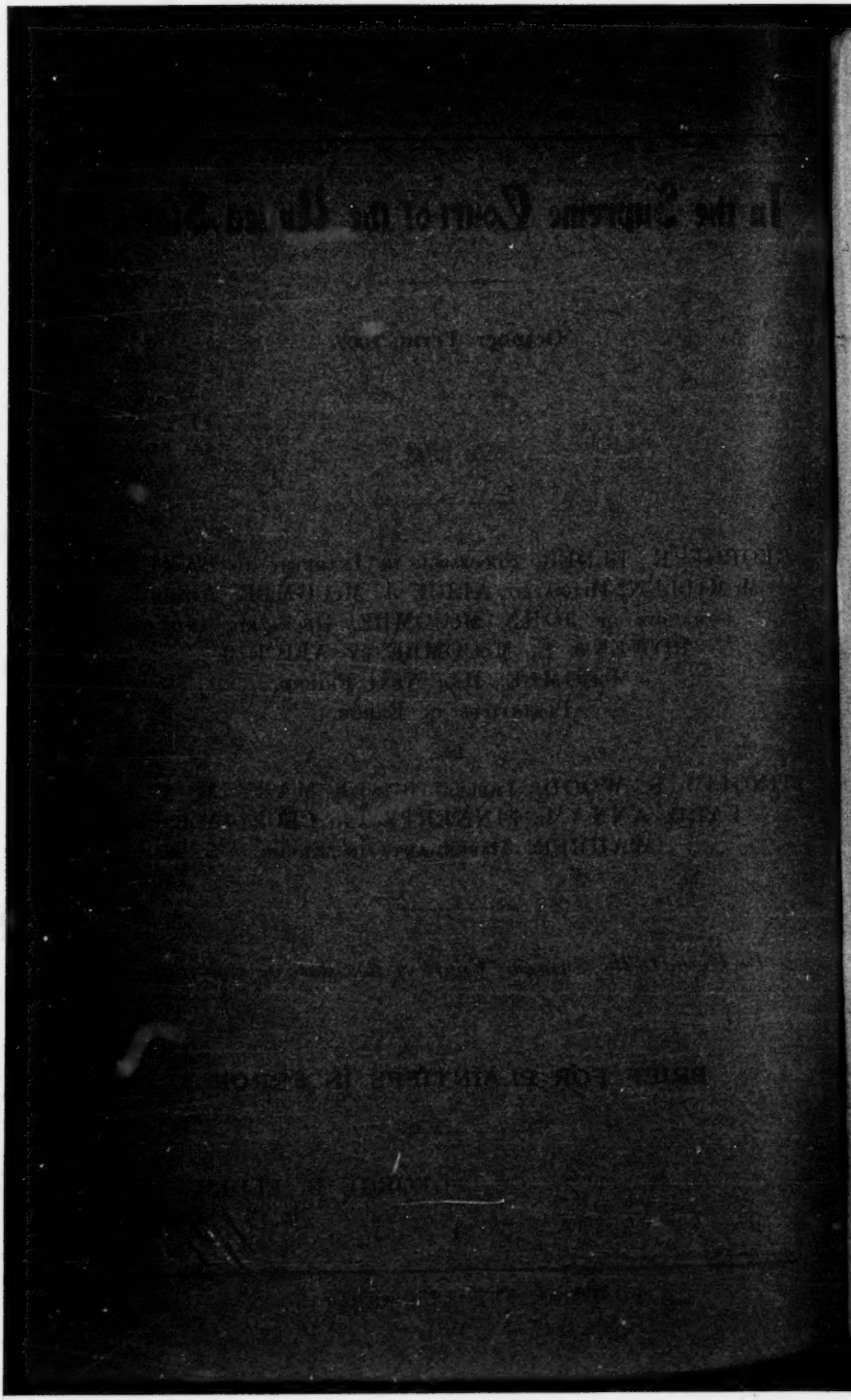
FINLEY S. WOOD, Executor with MARY E. LAIRD, ANNA L. PERRIGO and ORVILLE WARREN, Executors of [illegible],

In Error to the Supreme Court of the State of [illegible]

BRIEF FOR PLAINTIFFS IN ERROR.

GEORGE R. ELDER,

[illegible]



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In the Supreme Court of the United States.

October Term, 1907.

No. 393.

GEORGE R. ELDER, Successor in Interest to SAMUEL McMILLEN, Deceased; ALICE J. McCOMBE, Administratrix of JOHN McCOMBE, Deceased, and ROWENA E. McCOMBE by ALICE J. McCOMBE, Her Next Friend,
Plaintiffs in Error,

vs.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY and CECELIA L. WAHRER, Defendants in Error.

In Error to the Supreme Court of the State of Colorado.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The title of Plaintiffs in Error, appellees below, to an undivided one third interest of the Comstock Lode Mining Claim—an unpatented lode mining claim, was derived by mesne conveyance from the original locators thereof.

The title of Tingley S. Wood, Defendant in Error, appellant below, to an undivided one-third interest of the Comstock Lode Mining Claim, was based on a tax sale made August 5th, A. D., 1889, by the county

treasurer of Lake County, for the taxes of 1888. Deed being executed and delivered August 8th, 1892.

At the moment of preparing this statement, June 1, 1907, the Comstock lode, U. S. Survey No. 3613, is still unpatented, the title has not yet passed out of the United States and plaintiffs in error are each year, together with their co-owners, Mary M. Bullard and Cecelia L. Wahrer, performing one hundred dollars worth of annual labor upon said claim as required by the United States mining laws to hold said property.

This action was brought September 17, 1897 in the district court of Lake county, state of Colorado, in support of adverse claims filed in the United States land office at Leadville, Colorado, August 19 and 20, 1897, against a supplemental application for patent made in the name of Tingley S. Wood, to recover possession of an undivided one-third interest in and to the portion of the said Comstock lode embraced in said supplemental application for patent—being 1.82 acres—and for judgment that they were the owners of an undivided one-third interest of said entire Comstock lode as against said defendant in error, Tingley S. Wood.

The following is plaintiffs in error chain of title:

Exhibit B, Transcript 55-56, page 23. This claim was originally located February 19, 1878. Locators: R. Morrison, Donal McClean, David Griffin. Loc. Cer. filed February 28, 1878. Book 10, page 201, Comstock lode.

Exhibit C, Transcript 58-61, page 24. Mining deed, Ronald Morrison to Christian Gude; one-third Comstock lode, date September 18, 1878. Recorded September 28, 1878; book E., page 489.

Exhibit D, Transcript 62-64, page 26. Quit claim deed, Christian Gude to Wilhelmina Gude; one-third Comstock lode, date December 5, 1881. Recorded, book 54, page 506, December 5, 1881.

Exhibit E, Transcript 66-67, page 27. Mining deed, Wilhelmina Gude to Samuel McMillen and John McCombe; One third Comstock lode, Date April 5, 1894. Recorded April 7, 1894, book 148, page 422.

Exhibit F, Transcript 70-72, pages 29-30. Mining deed, Samuel McMillen to George R. Elder; one-twelfth Comstock lode, date October 19, 1899. Recorded October 19, 1899, book 177, page 511.

Exhibit G, Transcript 74-76, pages 31-32. Mining deed, Samuel McMillen to George R. Elder; one-twelfth Comstock lode, date October 20, 1899. Recorded October 20, 1899, book 177, page 514.

The following is defendant in error's (Tingley S. Wood) chain of title:

Exhibit X, Transcript 150-152, pages 47, 48, 49. Tax sale certificate of purchase. Amos Henderson, county treasurer. Date August 7, 1889. Comstock, survey, 3613; area, 9.67; one-third interest; amount, $1.38. C. T. Carnahan. Sale, August 5, 1889; for taxes, 1888.

Exhibit 1, Transcript 80-83, pages 34-35. Tax deed, M. F. Egan, treasurer, to C. T. Carnahan; one-third Comstock lode mining claim; 9.67 acres; cons., $1.38; subsequent taxes paid, $3.92. Date August 8, 1892. Recorded August 11, 1892; book 52, page 6.

Exhibit 2, Transcript 87-88, page 37. Quit claim deed, C. T. Carnahan to Tingley S. Wood; "Comstock, 3613;" cons., $1. Date October 31, 1893. Recorded May 29, 1895; book 158, page 174.

Exhibit Y, Transcript 150-156, pages 50-51. Tax sale certificate of purchase, Joseph H. Horner, county treasurer, to A. V. Hunter and T. S. Wood. Date October 3, 1895; for taxes, 1894; one-third Comstock; area, 9.67; amount, $3.63. Redeemed Tingley S. Wood, September 27, 1898.

The two pleas set forth in the separate answer of defendant in error were:

1. That the Comstock lode was taxable for the year 1888, and the county treasurer made a legal sale of the same August 5, 1889, and the tax deed executed and delivered the 8th day of August, 1892, was a valid transfer and conveyance of the property.

2. Plea of section 3904, Mills' Annotated Statutes, viz.: "No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding," etc. Transcript, folios 21-27, pages 9-12.

Replication of plaintiffs in error (plaintiffs below) set up the following defenses:

1. The Comstock lode was entered for patent December 31, 1884, for an area of 9.67 acres; that on May 2, 1887, the commissioner of the general land office cancelled one and eight-tenths acres of the entry and held the balance for cancellation, and upon March 12, 1894, the entire entry and receiver's receipt was cancelled; and that from and after May 2, 1887, said premises were not subject to taxation by the assessor of Lake county for and during the year 1888, for the reason that the title to the land was in the

United States; that the right to patent for said land was not complete.

2. That part of the ground included in this suit was still the subject of a separate adverse suit in the District Court of Lake county, between the Idaho lode and the Comstock lode, at the time of said void assessment in 1888.

3. That the advertisement of the tax sale notice was made exclusively in a Sunday newspaper, commencing Sunday morning, July 7, 1889; continuing Sunday, July 14, 1889; Sunday, July 21, 1889; Sunday, July 28, 1889 and Sunday August 4, 1889; that such notice was not a legal notice, and that all proceedings thereunder were without force and effect, and that the sale thereon was invalid and void, under the decision of Supreme Court of Colorado in Schwed vs. Hartwitz, 23 Colo., 187.

4. That the assessment of said premises and the tax sale thereof was beyond and outside of the power and jurisdiction of the taxing officers, and by reason of the fact that the title to said premises remained and continued in the United States from the 2d day of May, 1887, up to and until September 21, 1896, and still remained in the United States at the date of the replication, to a large portion thereof, and was and is therefore not subject to taxation by the State of Colorado, and by reason of the void and invalid advertisement of said premises for tax sale in a Sunday newspaper, which would divest the owner of his property without due process of law; and that no estoppel can arise under and by virtue of section 3904, M. A. S.; that to entitle defendant to plead that statute, his title must have some other and firmer basis

than a void assessment of property not subject to taxation, and a void process of sale by means of a tax sale notice published only on Sunday. Transcript, folios 28-44, pages 13-18.

Trial was had December 1, 1902, in the District Court of Lake county, Colorado, before the Hon. P. L. Palmer, district judge, presiding.

There were no contradictions in the evidence and the material facts were as follows:

Exhibit A, Transcript, folios 51-52, pages 20-21, adverse plat. Comstock vs. Comstock, exact copy of adverse plats filed in the United States land office, August 19 and 20, 1897, by Samuel McMillen and John McCombe.

Exhibit Z, Transcript, folio 161, page 53, proof of publication. Application for patent Comstock lode, Peter Finnerty and Wilhelmina Gude, dated Leadville land office, October 28, 1884. Total area claimed by application 7.88 acres.

That upon December 31, 1884, the Comstock lode was entered as containing 9.67 acres of ground. Mineral entry No. 2411.

That afterwards and upon May 2, 1887, the commissioner of the general land office of the United States cancelled mineral entry No. 2411, Comstock lode to the extent of 1.80 acres of ground and held the balance of the area for cancellation.

The grounds for the cancellation were as follows: See Transcript, folios 111-112, pages 42-43.

> "The papers in the matter of mineral entry No. 2411, made December 31, 1884, by Peter Finnerty et al., upon the Comstock lode claim, survey No. 3613, have been ex-

amined. The record shows that said claim as surveyed conflicts with survey No. 667, the "Idaho Lode" to the extent of 2.05 acres, that 1.8 acres of said conflict, exclusive of the conflict between survey 718 and said "Idaho" lode were expressly excluded from the application for patent for said Comstock lode; yet the ground embraced in said conflict is included in the entry. There is no law by which I am authorized to issue patent for the entry as it now stands. Therefore, said entry is hereby held for cancellation to the extent of 1.8 acres, the portion of said conflict which was excluded from the application for patent."

That afterwards by letters of August 7, 1894 and December 12, 1894, the commissioner of the general land office of the United States cancelled mineral entry No. 2411, Comstock lode, U. S. survey No. 3613, in its entirety.

See Transcript, folios 115-116, page 44.

"Washington, D. C., December 12, 1894.

"By office letter 'N' of August 7th, 1894, mineral entry No. 2411, made December 31, 1884, by Peter Finnerty et al., upon the Comstock lode, was held for cancellation because of failure to furnish satisfactory evidence of improvement, also evidence as to disposition of suit on adverse claim.

"I am now in receipt of your letter of November 13, 1894, inclosing proof of service, and reporting no action taken

by the parties in interest. The time for appeal having expired said mineral entry, No. 2411, is hereby cancelled."

Disregarding the fact that the entry of the Comstock lode was cancelled or acting in ignorance of this fact and that it was unpatented, unentered government land of the United States and therefore untaxable for the year 1888, the assessor of Lake county in the year 1888, assessed the property as follows:

Transcript, folios 119-149, pages 46-47.

"Comstock, No. 3613. Acres, 9.67. valuation, $100. Total tax $3.32, Cala (California) Mining District."

This assessment was made under section 1, of "An act providing for the taxation of mines and mining property in Colorado Session Laws, 1887, pages 340-342, sections 3222-3226, page 1822, 2 M. A. S., in effect July 4, 1887. It will be noted that the act went into effect two months after the cancellation of the Comstock lode, May 2, 1887. We insert a full copy of the act appendix. No. 3, section 1, reads as follows:

"Section 1, All mines and mining property of the class heretofore exempted by the Constitution of the State of Colorado, shall hereafter be assessed and taxed, and the taxes levied enforced by sale of the property taxed, in default of payment, in the same manner as is now or may be provided by law, in the case of other classes of taxable real estate."

Also under section 2823, General Statutes, 1883, section 3775, M. A. S., which reads as follows:

> "Lands entered by pre-emption, final homestead at public or private sale or otherwise, shall be subject to taxation whether the patent for the same shall have been issued or not; and when such entry shall be made before the first day of May in any year, the land so entered shall be subject to taxation for that year."

The term real estate, for purposes of taxation under section 2830, general statutes, 1883, page 824, Mills' Annotated Statutes, section 3782, is defined as follows:

> "All lands within the state to which title, or the right to title, has been acquired from the government of the United States."

The files of the Herald-Democrat introduced in evidence, see Transcript, folios 79-80, pages 33-34, folios 116-117, pages 44-45, show advertisement of the delinquent tax sale list for taxes of 1888, published only in the Sunday issue of the Herald-Democrat, commencing Sunday, July 7, 1889, first issue, also Sunday, July 14, 1889; Sunday, July 21, 1889; Sunday July 28, 1889, and August 4, 1889, entering in said notice the property in suit as follows: "The Comstock No. 3613, 9.67 acres, Cala (California) mining district, valuation, $100; taxes, $3.32." That this notice of tax sale was published only upon the five Sundays as mentioned above.

That upon the 7th day of August A. D., 1889, Amos Henderson, the county treasurer of Lake county, issued to C. T. Carnahan, tax sale certificate of purchase No. 1033, reciting the sale, August 5,

1889, of the following property: "Unknown-Comstock No. 3613; acres, 9.67; part sold, one-third interest; acres, 9.67; amount taxes, interest and costs paid, $1.38." Transcript, folios, 150-152, pages, 47-49, Exhibit X.

That upon August 8, 1892, M. F. Egan, treasurer of the county of Lake, made, executed and delivered treasurer's deed to C. T. Carnahan, as follows: "An undivided one-third (⅓) interest in and to the Comstock Lode Mining Claim No. 3613—9.67 acres, situate in California mining district, Lake county, Colorado. Amount paid, $1.38; subsequent taxes paid, $3.92; recorded August 11, 1892; book 32, page 6; see Transcript, folios 81-83, pages 34-35.

Quit claim deed, Chas. T. Carnahan to Tingley S. Wood; recorded May 29, 1895; book 158, page 174. Comstock, 3613; see Transcript, folios 87-90, pages 37-38.

Redemption tax sale certificate, issued September 26, 1897, to Tingley S. Wood for tax sale certificate, October 3, 1895, one-third Comstock lode taxes, 1894, ten days after suit brought. Exhibit Y, Transcript, folios 154-156, pages 49-50-51.

That upon August 20, 1897, the supplemental application for patent of the Comstock lode was adversed in the land office by T. J. Cash, H. W. Havens and Jerry Collins, claimants of the Collins' lode, and an adverse suit was instituted by them, September 18, 1897, in district court of Lake county, numbered 5025 of its docket, for the recovery of 2.05 acres of said Comstock lode—this suit is still pending and undetermined, and the court at the trial took judicial notice of the existence and pending of this suit upon its own records.

No proof was offered by defendant Wood of possession of the property, and his possession was only such as followed delivery of tax deed.

The decree of the court, Judge P. L. Palmer, was for the plaintiffs. See Transcript, folios 9-14, pages 3-4-5, Appendix No. 1.

The finding and decree of the court was based upon the objection of plaintiffs to the sale of August 5, 1889, and treasurer's tax deed, August 8, 1892. See Transcript, folios 85-86, page 36, Appendix No. 2.

Stated briefly, the finding of the trial court was:

That the tax sale and the tax deed relied upon by defendant was *absolutely void* upon its face; and that the officers, in assessing, the property being unentered public land of the United States, and attempting to sell the same by tax sale advertised exclusively upon Sunday, were without jurisdiction, power and authority to do so,

First. Because the deed showed upon its face a total area of 9.67 acres, and that the evidence disclosed that the title to 1.80 acres of this area remained in the United States, and was claimed by other parties than the parties to this suit, and was therefore untaxable under the statutes of Colorado.

Second. Because the deed showed upon its face a total consideration of $1.38—one dollar and thirty-eight cents—and that the evidence disclosed that this amount included illegal taxes blended in the consideration expressed upon government land of the United States, for which no receiver's receipt had been issued.

Third. That the county treasurer was without power to include in the area conveyed by defendant's deed, government land which was still owned by the United States.

Fourth. That the preliminary cancellation of 1.80 acres of this claim May 2nd, 1887, and the final cancellation of the entire Entry No. 2411 August 7, 1894, and December 12, 1894, rendered the entire claim untaxable and beyond the jurisdiction, power and authority of the officers of Lake county to assess, tax and sell as they attempted to do.

Fifth. That the Comstock lode not being taxable for the year 1888, the attempted sale thereof was absolutely void.

Sixth. That the title to the Comstock lode remaining in the United States, no Statute of Limitations could be pleaded against the United States and plaintiffs, the owners of the untaxable possessory preemption title, and in any event the statute could only commence to run against plaintiffs from the date of the United States patent, or at most reinstatement of the entry.

Seventh. Because the advertisement and publication of the notice of the tax sale for August 5, 1889, was made exclusively upon Sunday, July 7, 1889; Sunday, July 14, 1889; Sunday, July 21, 1889, and Sunday, July 28th, 1889, and did not constitute legal notice and due process of law, and that all proceedings thereunder were without force and effect, and that there was no sale, and that the county treasurer was without jurisdiction, power and authority to offer said property for sale, to accept a bid, and to execute and deliver a deed for the same.

Eighth. That the forfeiture claimed by defendant under his tax deed of date August 7, 1892, of the property of plaintiffs, was not made by due process of law and under the "law of the land," and was in viola-

tion of and in direct contravention of section twenty-five (25) of article two (2), Constitution of Colorado, which reads:

"That no person shall be deprived of life, liberty or property without due process of law."

And of section one (1), article five (5) of the Constitution of the United States, which reads:

"Nor be deprived of life, liberty, or property without due process of law."

Ninth. That the tax deed being absolutely void on its face, attempting as it does to convey untaxable land of the United States; no such sale taking place, the claim not being subject to taxation, and for complete lack of power, authority and jurisdiction in the officers to sell the same; the Statutes of Limitation did not run in favor of defendant appellant. A void tax deed for vital jurisdictional error can neither create title, set the statute running, nor draw to its holder the constructive possession of the property; there being nothing for the statute to operate upon, nothing for it to run in favor of or against, and nothing to set it in motion.

The defendant, Tingley S. Wood, perfected an appeal to the Supreme Court of Colorado—to this decree September 16, 1903. See assignment of errors of defendant, Transcript, folios 174-179, pages 55, 56, 57 and 58.

Argued in Supreme Court of Colorado before department No. 2, May 15, 1906. Transcript, folio 180, page 58.

Judgment reversed and remanded to district court of Lake county, with instructions to vacate the judgment and decree and enter judgment for appel-

lant Wood for possession of the premises according to the prayer of his answer, June 4, 1906. See Transcript, folios 193-195, pages 64 and 65.

Opinion of Supreme Court of Colorado reversing judgment and decree below, June 4, 1906. See Transcript, folios 182-193, pages 59-64.

Petition of appellees, plaintiffs below, for rehearing filed June 13, 1906. See Transcript, folios 195-230, pages 65-83.

Petition of appellees, plaintiffs below, for transfer to Supreme Court en banc, filed June 13, 1906. See Transcript, folios 231-235, pages 83-85.

Petition to transfer to Supreme Court en banc and petition for rehearing denied. Transcript, folios 236, 237, 238, page 86.

Petition for citation for writ of error to Supreme Court of the United States, filed August 6, 1906. Transcript, folio 272, page 86.

Asignment of errors filed August 6, 1906. Transcript, folios 242-270, pages 87-95. See appendix No. 4.

Order of allowance of writ of error to Supreme Court of the United States. Folios 273-274, page 97. August 6, 1906.

Citation for writ of error to Supreme Court of United States and acceptance of service August 6 and 8, 1906. See Transcript, folios 275 to 278, pages 98-99.

Bond filed August 6, 1906. Folios 279-280, pages 99-100.

Citation issued August 6, 1906. See Transcript, folios 281-283, pages 101-102.

Return August 10, 1906. See Transcript, folios 283-288, pages 102-104.

Designation of parts of Record to be printed in Transcript of Record August 23, 1906. Folios 289-291, pages 104-105.

Transcript of Record filed in Supreme Court of United States September 6, 1906. Folios 292-293, page 105.

We have printed in the appendix to this argument:

I. Decree of Judge Palmer in court below, cancelling tax deed.

II. Objections of plaintiffs below to tax deed upon which decree was based.

III. Statute of Colorado, taxing mines and mining claims. Session Laws 1887, pages 340-341; sections 3222-3226, page 1822; 2 Mills' Annotated Statutes.

IV. Second paragraph of section 4 of the act of congress, approved March 3, 1875, To Enable the People of Colorado to form a Constituion, etc.

V. Ordinance of Colorado, accepting the second paragraph of section 4, of enabling act, December 20, 1875.

VI. Section 3904, M. A. S., when action for recovery of land sold for taxes will lie. Five years limitation.

VII. Section 3883, Mills' Annotated Statutes. Requirement of advertisement of tax sale notice under Colorado statutes.

VIII. Sections 2823 and 2830, General Statutes 1883, Mills' Annotated Statutes, sections 3775 and 3782.

ARGUMENT.

I.

Before proceeding to a discussion of the specific questions in the record, which show that the plaintiffs in error were clearly entitled to the decree and judgment entered by the District Court of Lake county, Colorado, in their favor, and that the Supreme Court of Colorado should have affirmed said decree and judgment, we desire to assert the grounds for our right to the review of this case by the Supreme Court of the United States under our assignments of error.

In its decision reversing the decree of the District Court of Lake county, and entering a judgment for defendant in error, the Supreme Court of Colorado makes the following statement (Transcript, folio 188, pages 61-62):

> "It is therefore settled in this state, under laws of 1887, that all mines and mining property bearing precious metals, regardless of its tenure—that is, whether held under patent, application for patent or mining location—are subject to taxation."

Again, transcript, folio 192, pages 163-164:

> "Our conclusions are, that under and by virtue of sections 3222-25, Mills' Ann. Sts., the Comstock lode was subject to assessment and taxation in the year 1888; that the taxes assessed against the same being delinquent in 1889, the property was subject to sale in that year; that the tax deed issued by the

county treasurer August 8, and recorded August 11, 1892, was authorized."

These two clauses contain the court's answer to its own inquiry (Transcript, folio 185, page 60):

> "Are mining claims in this state, which have not been patented or entered for patent, subject to taxation?"

It is the undisputed fact of this record that the Comstock lode, mineral entry 2411, entered December 31, 1884, for 9.67 acres, was cancelled May 2, 1887, by the commissioner of the general land office as to 1.80 acres of its area, and by the same order the balance of said entry 2411 was held for cancellation, and finally cancelled in its entirety by letters of the commissioner dated August 7 and December 12, 1894.

The act of 1887, pages 340-341, was passed April 4, 1887, and took effect July 4, 1887, nearly two months after the cancellation of this claim and a large part thereof. Section 1 (see Appendix III) states:

> "Shall hereafter be assessed and taxed * * * in the same manner as is now or may be provided by law in the case of other classes of taxable real estate."

This undoubtedly refers to sections 2823 and 2830, General Statutes, 1883. (See Appendix VIII.)

> 2823. "Lands entered by pre-emption, final homestead, at public or private sale, or otherwise, shall be subject to taxation, whether the patent for the same shall have

> been issued or not; and when such entry shall be made before the 31st day of May in any year, the land so entered shall be subject to taxation for that year."

Section 2830 defines the term "real estate" for purposes of taxation, as follows:

> "All lands within the state to which title, or the right to title, has been acquired from the government of the United States."

We have quoted from these declaratory propositions of the statutes of Colorado to prove:

> "That real estate of any character can only be taxed '*after entry has been made.*'"

There is no exception to this rule.

The apparent exception of section 4 of the act of 1887, Session Laws, 341, limits it only to "mines or mining claims that are not patented or entered for patent, but shall be assessable and taxable under this act, on account of *producing gross proceeds.*"

Section 4 continues to state that in that case "the possession shall be the subject of the assessment," and "the sale for such taxes shall pass the title and right of possession to the purchaser."

Plaintiff's in Error Fourth Assignment of Error (Transcript, folios 249, pages 91-92.) raises this question as follows:

> "That the Supreme Court of Colorado erred in reversing the judgment and decree of the court below and directing the entry of judgment for appellant, and in holding

and assuming to hold that unpatented, unentered mining locations held under the mining statutes of the United States, the title to which still remains in the United States, can be taxed and are taxable for other purposes than net output tax under the laws of Colorado, and especially under the act of April 4, 1887, Mills' Ann. Statutes, sections 3224-3226, and in holding that the unentered, unpatented area of the Comstock lode, the property of the plaintiffs in error, was taxable under the laws of the state of Colorado, and especially under the act of April 4, 1887, M. A. S., sections 3224-26, for the year 1888.

"That such holding and construction of the laws of the state of Colorado, and especially of the act of April 4, 1887, Session Laws of 1887, pages 340-342; Mills' Ann. Stat., sections 3224 to 3226, by the Supreme Court of Colorado, is in violation of and in direct contravention of the second paragraph of the fourth (4th) section of the Enabling act of Congress, approved March 3, 1875, for the admission of the state of Colorado, as follows:

" 'Secondly, That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory and that the same shall be and remain *at the sole and entire disposition of the United States*, and that the lands belonging

to citizens of the United States residing without said state shall never be taxed higher than the lands belonging to residents thereof; *and that no taxes shall be imposed by the state on lands or property therein belonging to,* or which may hereafter be purchased by *the United States.*'

"That the decision of the Supreme Court of Colorado, sustaining and upholding such construction and interpretation of the laws of Colorado, and especially the act of April 4, 1887, Session Laws of 1887, pages 340-342, Mills' Ann. Stat., sections 3224 to 3226, was in violation of and in direct contravention of, and a denial of and against the title, right, privilege and immunities claimed by plaintiffs in error under the second paragraph of the fourth section of the Enabling Act of Congress, approved March 3, 1875, for the admission of the state of Colorado, 18 U. S. statutes at large, 474."

The court below found:

That as the title to the Comstock lode and a large part thereof remained in the United States at the date of trial, December 1 and 2, 1902, and as by the act of Congress of March 3, 1875, eighteenth U. S. Statutes at Large, 474, admitting Colorado into the Union as a state, it was provided: "That no taxes shall be imposed by the state on lands or property therein belonging to, or which may hereafter be purchased by, the United States." The taxes attempted to be levied upon said Comstock lode for the year 1888

were illegal and void, because levied in violation of that act of congress.

The court below by its judgment and decree found:

That the preliminary cancellation of one and eighty one-hundredths (1.80) acres of the Comstock claim May 2, 1887, by the commissioner of the general land office, and the final cancellation of the entire Comstock lode mineral entry No. 2411, August 7, 1894, and December 12, 1894, rendered the entire claim untaxable and beyond the jurisdiction, power and authority of the officers of Lake county to assess, tax and sell, as they attempted to do; and the court's judgment and decree for plaintiffs in error was based upon the fact that the deed showed upon its face a total area of nine and sixty-seven one-hundredths (9.67) acres; that the title to one and eighty-one-hundredths (1.80) acres of this area remained in the United States, and was claimed by other parties than the parties to this suit, being also claimed by T. J. Cash, H. W. Havens and Jerry Collins, claimants of the Collins lode, for which they instituted an adverse suit September 18, 1897, in the District Court of Lake county, being No. 5025 of the docket of this same court, in support of their adverse claim of the Collins lode vs. the Comstock lode, filed in the United States land office at Leadville, August 20, 1897, and still pending and undetermined; and that the property was therefore untaxable for the year 1888, under the statutes of Colorado; that the deed showed in its consideration that it included illegal taxes blended in the consideration expressed upon government land of the United States, for which no receiver's receipt was

issued, and the deed based on such consideration was void, and that the county treasurer was without power to include in the area conveyed by defendant's deed government land which was still owned by the United States. That no statute of limitations cou'd cure the void deed of defendant in error, or could be interposed in his behalf, for the reason that such statute could not run against the United States, and as between conflicting claimants to unentered public domain of the United States the statute of limitations could not commence to run until after patent issued for the property."

The tenth allegation of the replication of plaintiffs in error, in the first and third paragraphs (see Transcript, folios 31 to 33, pages 14-15), clearly sets up and pleads these grounds of defense, as follows:

> "'10. Plaintiff denies that for the year 1888 said premises were subject to taxation, and denies that in said year taxes were duly and properly assessed against the same, and the plaintiff expressly alleges and so charges the fact to be, that by virtue of the letter of the honorable commissioner of the general land office of the United States, dated May 2, 1887, cancelling and holding for cancellation the said receiver's receipt, dated December 31, 1884 ,and the further final cancellation of said entry by letter of the honorable commissioner of the general land office of the United States, dated December 12, 1894, the said premises were not subject to taxation by the assessor of Lake county for

and during the year 1888, for the reason that the title to the land was in the United States at the time the assessment was attempted to be made, and the land was not taxable for the year 1888; that the right to a patent for said land was not complete, and the title still remained in the United States, and the claimants of said premises in the year 1888, to-wit, the heirs of Peter Finnerty and Wilhelmina Gude, had no taxable title therein; and plaintiff alleges that said premises did not in the year 1888 come under the 'term' as stated in General Statutes of Colorado, section 2830, page 824, 'all lands within the state to which title or the right to title has been acquired from the government of the United States,' and plaintiff expressly alleges and so charges the fact to be, that by reason of such cancellation upon May 2, 1887, no entry was made upon said premises before the 1st day of May, A. D. 1888, as was required to subject same to taxation by the provisions of section 2823 of the General Statutes of Colorado of 1883, page 822.

And plaintiff expressly alleges that at the time of said assessment, to-wit, in the year 1888, and at the time of said pretended and attempted sale in the year 1889, the title to said Comstock lode, remained and was vested in the United States for taxable purposes; that the assessor of Lake county assessed the said Comstock lode as containing nine and 67/100 acres of ground for and in and during the year 1888, while in truth and in fact the receiver's receipt therefor had

been cancelled for a large part of said ground, to-wit: One and 80/100 acres of ground, being the ground then in litigation, and for which an adverse suit was still pending in the District Court of Lake county, between the owners of the Idaho lode mining claim, U. S. survey No. 667, and the Comstock lode, U. S. survey No. 3613; and the balance of said ground, 7.88 acres, was held for cancellation by the department, and finally cancelled by letter of December 12, 1894, by reason of which facts said property was not subject to taxation in the year 1888, nor to treasurer's sale for unpaid taxes in the year 1889, as alleged in said tenth defense of defendant Tingley S. Wood. And plaintiff further alleges that the said 1.80 acres of ground so taxed without authority of law, is still unpatented and the title thereto, at the date of the filing of this replication remains in the United States, and is not now subject to taxation by the laws of the state of Colorado.

Allegation eleven to the same effect. (See Transcript, folio 34, page 16):

> "11. Plaintiff denies each and every allegation of the eleventh defense of defendant, and expressly alleges that the assessment of said premises and the tax sale thereof was beyond and outside of the power and jurisdiction of the taxing officers, and by reason of the fact that the title to said premises remained and continued in the United States from the 2d of May, 1887, up to and until September 21, 1896, and still remains in the United States at this date, to a large portion thereof, and was and is there-

fore not subject to taxation by the state of Colorado."

The first six objections to Exhibit No. 1, Tax Deed (See Transcript, folios 84-86, page 36), covered the same proposition.

So, also, motion of plaintiff for judgment. (See Transcript, folios 106-109, page 41.)

These matters were presented at large in plaintiffs in error brief as appellee before the Supreme Court of Colorado, on pages 13, 14 and 15; pages 23-39, pages 50-53, inclusive.

The petition of plaintiffs for rehearing, pages 12-27, inclusive (see Transcript, folios 207-227, pages 71-81), contains a further presentation of the same claims.

Throughout the entire case in its trial before the District Court and upon its appeal in the Supreme Court of Colorado by defendants in error (appellants), the title of plaintiffs in error to the premises in controversy from the date of original cancellation, May 2, 1887, through the period of final cancellation, and up to and until the reinstatement by the Land Department, September 21, 1896, of a part and portion of the original entry, was simply that of a possessory mining location, held under the mining acts of congress. In this case, after the cancellation and suspension of entry, it can not be said that at any stage prior to the institution of this action and since that time, that the right to a patent for the premises *in suit* was complete, nor could it be urged in the face of the pending of adverse suits over part of the conflicting territory, that the equitable title is fully vested. It is plain from the record that many acts

remained to be done, both by the mineral claimant, the Land Department of the government and the courts, to establish and perfect the foundation right to a patent from the United States.

The court below in the trial of this case found the contention of plaintiffs correct; that the title remained in the United States, and was, by that fact, untaxable and unassessable by the assessor and the taxing officers of the county. The two grounds for this finding were:

First—That the enabling act of congress of March 3, 1875, admitting Colorado (see Appendix IV), and the ordinance of Colorado (Appendix V), absolutely prohibited the imposition by the state or its governmental sub-divisions of taxes on lands or property therein belonging to the United States.

Second—That it is a rule of the federal courts and the land department of the United States in suspended and cancelled entries, that the public lands are not taxable so long as a condition precedent to the acquisition of title from the United States by the grantee remains unfulfilled, and that until the very last moment, that liens or equitable rights of the United States are extinguished, no matter how trivial or small may be the right or the lien reserved, the land is not subject to state taxation.

Hussman vs. Durham, 165 U. S., 145.
Hussman vs. Durham, 88 Iowa, 29.
Kan. Pac. R. R. Co. vs. Prescott, 16 Wall., 603.
U. P. R. R. Co. vs. McShane, 22 Wall., 144.
North. Pac. R. R. Co. vs. Rockne, 115 U. S., 600.

Central Colo. Imp. Co. vs. Pueblo Commrs., 95 U. S., 259.
Petts vs. Clay, 27 Fed Rep., 635.
Coulter vs. Stafford, 56 Fed Rep., 564.
Bronson vs. Keokuk, 3 Dill., 490.
Campbell vs. Spears, 120 Iowa, 670.
Duncan vs. Newcomer, 9 S. D., 375.
Scott vs. Chicasaw Co., 46 Iowa, 253.
Reynolds vs. Plymouth Co., 55 Iowa, 90.
Moriarty vs. Boone Co., 39 Iowa, 634.
Kohn vs. Barr, 52 Kansas, 269.
Calder vs. Keegan, 30 Wis., 126.

Plaintiff's in error, first, second and third assignments of error (Transcript, folios 242-248, pages 87-91.) cover practically the same specific ground, establishing the jurisdiction of the Supreme Court of the United States over this writ of error, and will be discussed together:

> "That the forfeiture claimed by defendant under his tax deed of date August 8, 1892, of the property of plaintiffs in error, was not made by 'due process of law,' and under the 'law of the land,' and was in violation of and in direct contravention of plaintiffs in error express right, title, privilege and immunity under section twenty-five (25) of article two (2) Constitution of Colorado, which reads: 'That no person shall be deprived of life, liberty or property without due process of law.' And section one (1), article five (5), being the fifth (5th) amendment to the Constitution of the United

States, which reads 'Nor be deprived of life, liberty or property, without due process of law,' and section one (1), article fourteen (14), being the fourteenth (14th) amendment to the Constitution of the United States, which reads: 'Nor shall any state deprive any person of life, liberty or property without due process of law.'

"That the judgment and decree of Judge Palmer in the court below, for plaintiffs in error, found that the notice of tax sale was published exclusively in the Sunday edition of the Leadville Herald-Democrat, and was not a legal notice of the sale; that Sunday is *Dies non Juridicus* and the advertisement did not constitute 'due process of law,' was not a compliance with the statute; that a sale pursuant to such notice was void and vested no title in the purchaser, and the tax deed based on such void notice was absolutely void and no such sale took place; that the publication of a tax-sale notice under the statutes of Colorado, is the fundamental step and pre-requisite in the process of law to deprive the citizen of his property for failure to pay taxes, and where this step is absolutely void, as in this case, all proceedings thereunder were without force or effect, and the sale thereunder passed no title, and that the county treasurer was without jurisdiction, power and authority to offer said property for sale, to accept a bid, and to execute a deed for the same.

"That the process being absolutely void, no such sale taking place, the taxing officers not having the power, authority and jurisdiction to sell the Comstock lode, and the tax deed being void for vital jurisdictional errors, it could neither create title, set the Statute of Limitations (section 3904, M. A. S.) running, nor draw to its holder the constructive possession of the property, there being nothing for the statute to operate upon, nothing for it to run in favor of or against and nothing to set it in motion."

This claim was made by plaintiffs in error in their replication in the tenth and eleventh allegations (Transcript, folios 33-35, pages 15-16), as follows:

"In further reply to said tenth defense plaintiff alleges that the treasurer of Lake county, for and during the year 1888, carried the taxes against the Comstock lode upon his books, as received from the assessor of Lake county, as 'Comstock, No. 3613, 9.67 acres, $3.32;' that afterwards, and upon July 7, 1889, he attempted to advertise the said premises at tax sale, in the Leadville Herald-Democrat, commencing said advertisement in said newspaper upon and in its issue of Sunday morning, July 7, 1889, and continuing said advertisement in said Sunday issue only—July 14, 1889; July 21, 1889; July 28, 1889, and August 4, 1889. That in said advertised notice of sale the said treasurer entered said premises as 'Comstock, No. 3613,

9.67 acres, $3.32.' That by reason of said advertisement in a Sunday newspaper only, and published and issued upon Sunday only, such notice was not a legal notice, and that all proceedings thereunder were without force and effect, and that the sale thereon was invalid and void. Wherefore, and by reason of the premises, the said Charles T. Carnahan and his grantee, the said Tingley S. Wood, could and did take no title to said premises by such void and invalid sale, advertisement and deed procured thereby. That said sale was and is void, for the reason that the advertisement was made exclusively by publication in a newspaper issued on Sunday, and which sale was declared void and invalid by the decision of the Supreme Court of Colorado, in the case of Schwed vs. Hartwitz et al., reported in 23d Colo., 187, and therefore such claim of title constitutes no defense."

Further, in line nine, allegation ten:

"And by reason of the void and invalid advertisement of said premises for tax sale in a Sunday newspaper, which would divest the owner of his property without due process of law; and that no estoppel can arise under and by virtue of section 3904, M. A. S. of the State of Colorado, being section 1, page 320, Laws 1885. And plaintiff further alleges that to entitle defendant to plead that statute, his title must have some other and firmer basis than a void assessment of prop-

erty not subject to taxation, and a void process of sale by means of a tax sale notice published only on Sunday."

The seventh objection made to the admission of tax deed of defendant Wood (Transcript, folios 85-86, page 36) raised the same question.

In the Supreme Court of Colorado the question was presented in the original brief of appellees, plaintiffs in error here (page 14):

> "Seventh. Because the advertisement and publication of the notice of the tax sale for August 5, 1889, was made exclusively upon Sunday, July 7, 1889; Sunday, July 14, 1889; Sunday, July 21, 1889, and Sunday, July 28, 1889, and did not constitute legal notice and due process of law, and that all proceedings thereunder were without force and effect, and that there was no sale, and that the county treasurer was without jurisdiction, power and authority to offer said property for sale, to accept a bid, and to execute and deliver a deed for the same.
>
> "Eighth. That the forfeiture claimed by defendant under his tax deed, of date August 7, 1892, of the property of plaintiffs, was not made by due process of law and under the 'law of the land,' and was in violation of and in direct contravention of section twenty-five (25) of article two (2), Constitution of Colorado, which reads:
>
> "'That no person shall be deprived of life, liberty or property without due process of law.'

"And of section one (1), article five (5), of the Constitution of the United States, which reads:

"'Nor be deprived of life, liberty or property without due process of law.'"

Pages 15 to 22, inclusive, of appellees' original brief in the Supreme Court of Colorado were devoted exclusively to a discussion of the two foregoing findings of the district judge, below.

We quote from pages 20-21 of appellees' brief:

"But the ingenious and versatile counsel for appellant, who passed over this vital and jurisdictional error in his argument in absolute silence, may loudly proclaim that a tax sale notice is not process, and not being known to the law as process, and not operating upon persons and property as such, it is immaterial whether the notice is published upon Sunday or not."

Article 2, section 25, of the Constitution of Colorado, reads in part:

"That no person shall be deprived * * * of property without due process of law."

Then, upon this horn of the dilemma assumed by counsel, we must interpret this section of the Constitution with the notice now before the court. The state does not go into a court, nor does the state require or allow the owner of the land taxed to enter a court to have the right of the state to sell the land

tried. Then, there is no judicial tribunal to determine and make a finding as to the correctness of the proceedings had by the officers of the law to sell the land. This proceeding is a summary one, as there is no provision of law by which a court can make a finding, render a judgment, make a decree, or an order, as to the correctness or validity of the proceeding; a sale is made without any judicial proceeding whatever being had thereon. Then, unless this notice operates as a process, the land is taken without due process of law. If it is intended to, and does operate as such notice, then the question still arises, can, upon that notice, the plaintiffs below—appellees herein—be deprived of their property under the section referred to without an action of the court being first had thereon. But if this is not a process, as this court has held in Schwed vs. Hartwitz, 23 Colo., 189, and as appellees claim it to be, then it is clearly in violation of that constitutional provision to sell the property and divest the owner of the title thereof.

If this notice be not a process within the meaning of said section then it is a confiscation of the property of a citizen. Section 25 applies with equal force to the state as to the individual, but more especially was it intended to apply to the state as to taking property for public uses, or for sales for taxes, like the case at bar, or confiscation; and where the state divests the citizen of his property without due process of law, it is a violation of the section of the Constitution referred to, no difference whether the state purchases it or whether some other person or quasi-corporation purchases it. Appellant's grantor has been invested with the title to this property without any process of law whatever, and yet the appellees and

their grantor are divested of their property and they have not been permitted their day in court.

This was again called to the attention of the Supreme Court of Colorado, in appellees' petition for rehearing, pages 2-12. (See Transcript, folios 196-207, pages 66 to 71.)

This Honorable Court will not question our assumption, that it is almost an universal proposition upon the consideration of tax deed titles, both in the *nisi prius* courts and the appellate courts, to consider first, last and all the time, whether the divestiture of title by tax sale has been made in full compliance with the law, has been made by due process of law, and by the law of the land.

The Supreme Court of Colorado in Brown vs. City of Denver, 7 Colo., 311, discussing "due process of law" under section 25, article 2, says:

> "The doctrine of the authorities is that, whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise; at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been

committed must be given. Otherwise the constitutional guarantees above cited are infringed."

So also—

Great West Min. Co. vs. Woodmas of Alston Min. Co., 12 Colo., 55:

"The courts have uniformly held that this requirement demands that there shall be notice and hearing before condemnation. Any proceeding which violates these principles is not 'due process of law' and is not according 'to the law of the land.' Where the property of a citizen is taken and condemned without notice to him, it is entirely immaterial whether it be a special or general judgment; the fundamental wrong in such case being that his property is taken and conveyed to some other person without his knowledge."

Quoting:

Stuart vs. Palmer, 74 N. Y., 183.

Clark vs. Mitchell, 69 Mo., 627,

Justice Helm says in Re Senate Bill No. 65, 12 Colo., 469:

"It is a principle declared by our constitution (section 25, article 2), and of universal recognition, that no person shall be deprived of life, liberty or property without due process of law. But there can not be due process of law unless the party to be affected has his day in court."

Again—

> Crisman vs. Johnson, 23 Colo., 264:
> "A statute undertaking to obviate the objection that an alleged tax sale in fact never took place would be unconstitutional, as its effect would be to deprive the owner of property without due process of law."

The judgment of reversal denied the rights claimed by plaintiffs in error under these two clauses of the constitution of the United States and the similar clause of the constitution of Colorado, and the judgment of reversal could not be entered without finding, in opposition to the enabling act of congress and the decision of the District Court below, that United States land, whose title had not vested in the locator by purchase, was taxed. These were claims at the foundation of the entire case and were decided adversely to the rights of plaintiffs in error. The prohibitions of the fifth and fourteenth amendments of the constitution of the United States, as well as section 25 of article 2, Constitution of Colorado, extend to any action of the state through its constituted authorities, and therefore include any divestiture of property through tax assessments, levies and tax sales, made without due process of law.

We submit that under the following authorities this court should take jurisdiction to pass upon this writ of error.

> Proprs. of Bridges vs. Hoboken Land & Imp. Co., 68 U. S., 1 Wall, 116.
> Roby vs. Colehour, 146 U. S., 153-159.
> De Saussure vs. Gaillard, 127 U. S., 216.

Brown vs. Atwell, 92 U. S., 327.
Wilson vs. Blackbird Cr. Marsh Co., 27 U. S., 2 Pet., 245.
Chicago Life Ins. Co. vs. Needles, 113 U. S., 574.
Sayward vs. Denny, 158 U. S., 180.
C., B. & Q. Rd. Co. vs. Chicago, 166 U. S., 226.
Bells Gap R. Co. vs. Penn., 134 U. S., 232.

To the point that an advertisement of tax notice upon Sunday exclusively was not a legal notice and due process of law, we cite:

Schwed vs. Hartwitz, 23 Colo., 189.
Scammon vs. City of Chicago, 40 Ill., 146.
Black. Tax Title (2d ed.), section 210.
Blackwell Tax Titles (5th ed.), section 440.
Ormsby vs. Louisville, 79 Ky., 199.
Sawyer vs. Cargile, 72 Ga., 290.
Brannin vs. Louisville, 4 Ky. Law Rep., 384.
McLaughlin vs. Wheeler, 2 S. D., 379.
Shaw vs. Williams, 87 Ind., 158.

The second and third assignments error allege a similar violation of the rights of plaintiffs in error, upon slightly different grounds, as follows:

That the tax deed showed upon its face the inclusion in the land conveyed of untaxable, unentered government land, and was void upon its face, and could not divest plaintiffs of their possessory right to the property.

That the tax deed showed upon its face in the consideration expressed, the inclusion of illegal taxes

assessed against untaxable, unentered land, and was void upon its face and could not divest plaintiffs of their possessory rights to this property.

That the total consideration of one dollar and thirty-eight cents ($1.38) included illegal taxes upon government land of the United States for which no receiver's receipt was issued.

That the Comstock Lode contained an area of nine and sixty-seven one-hundredths (9.67) acres, as shown by the face of this tax deed, and that one and eighty one-hundredths (1.80) acres, a part of this area, was cancelled by letter of the Honorable Commissioner of the United States Land Office, dated May 2, 1887, which cancellation still remained in force and effect December 1 and 2, 1902, the days of trial; that under the laws of the state of Colorado, that portion of one and eighty one-hundredths (1.80) acres, the title remaining in the United States, was not taxable for the year 1888, nor could it be sold in the year 1889, and that the deed was therefore void and could pass no title against the plaintiffs.

That the final cancellation of the whole Comstock lode mining claim—being the entire Mineral Entry No. 2411, August 7, 1894 and December 12, 1894, rendered the entire claim untaxable and beyond the jurisdiction, power and authority of the officers of Lake county to assess, tax and sell, as they attempted to do, from and after the date of original cancellation, May 2, 1887; that the Comstock lode not being taxable for the year 1888, the attempted taxation and sale thereof was absolutely void.

That the assessment and sale of the Comstock lode was void and without jurisdiction in the officers,

as the title to the land remained in the United States and was not taxable by the state of Colorado or the county of Lake, and the equitable title was not fully vested in plaintiffs' grantors, and there remained something to be done by the plaintiffs and the United States government, to establish the right and title of plaintiffs' grantors, and that the title to the Comstock lode and a great part thereof, remaining in the United States—no statute of limitations could be pleaded against the United States and plaintiffs' owners of the untaxable possessory pre-emption title; that the pendency of this adverse ejectment suit, as well as the pendency of the adverse ejectmnt suit of the Collins lode vs. The Comstock lode for two and five one-hundredths (2.05) acres of the area, determined a large portion of this ground as unentered, untaxable mining ground, and that no statute of limitations could run against plaintiffs until patent issued.

That the United States still owning the fee to the land while the entry remained cancelled, it could not be taxed and sold.

That while part of the claim was still owned by the United States after the cancellation, the incorporation of illegal taxes upon this part with other taxes levied upon the other part of the claim, rendered the whole sale void *in toto.*

Under these two assignments of error, it is apparent that the government, through its land department, has never completely changed the ownership of this Comstock lode from itself to the holders of the possessory title. That it still retains the entire title, at its own disposition, to be finally parted with after the several contests before the land officers and the courts are at last decided.

There has been no proper seggregation of the area of the Comstock lode and issuance of such a minument of title by the land department of the United States to bring it within the purview of the taxing power of the State of Colorado, certainly not up to the 21st day of September, 1896, the date of the partial re-instatement of the entry.

The refusal of the land department of the government to confirm the mineral entry of the Comstock lode in its entirety from its first order of cancellation May 2, 1887, up to and until September 21, 1896, a period of nine years and four months, is proof positive that no full equitable title passed to the grantees by those proceedings and that the government through its land department still held full control of the land and by its various rulings established the fact that the right to patent in the location claimants was incomplete. The decisions of this court plainly support the proposition.

> "Unless every act made a condition to the perfect right to the land has been performed, the land will not be taxable, although the grantee have the full enjoyment of it, and the delay in the performance of the condition be attributed to him."
>
> Kansas P. R. Co. vs. Prescott, 16 Wall, 603.
>
> U. P. R. R. Co. vs. McShane, 22 Wall, 444.
>
> Northern Pac. R. R. Co. vs. Traill Co., 115 U. S., 600.
>
> Hunnewell vs. Cass Co., 22 Wall, 464.

Central Colo. I. Co. vs. Pueblo Co., 95 U. S., 259.
Lamborn vs. Dickinson Co., 97 U.S. 181.
U. P. R. R. Co. vs. Dodge Co., 98 U. S., 541.

People vs. Shearer, 30 Cal., 645.
Central P. R. R. & Co. vs. Howard 51 Cal., 229.
Long vs. Culp, 14 Kan., 412.
White vs. B. & M. R. R. Co., 5 Neb., 393.
Elling vs. Thexton, 7 Mont., 330.
Musser vs. McRae, 38 Minn., 409.
Van Brocklin vs. Tennessee, 117 U. S., 151.
Wisconsin Cent. R. R. Co. vs. Price Co., 133 U. S., 496.
Hussman vs. Durham, 165 U. S., 145.
Campbell vs. Spears, 120 Iowa, 670.
Duncan vs. Newcomer, 9 S. D., 375.
Pitts vs. Clay, 27 Fed., 635.

The eleventh, twelfth and thirteenth assignment of errors are to the holding of the Supreme Court of Colorado that section 3904, M. A. S., five year limitation was a bar to the action of plaintiffs in error. Plaintiffs below, they were as follows:

Eleventh. The Supreme Court of Colorado erred in its decision and holding that the statute of limitations of five years (section 3904) was a bar to the recovery of the title of plaintiff's in error.

Twelfth. The Supreme Court of Colorado erred in reversing the judgment and decree of the court be-

low, which held that as between rival individual claimants of land acquired from the United States government, the statute of limitations does not begin to run in favor of an adverse claimant as against an entryman until the latter by a full compliance with the law, becomes entitled to a patent.

Thirteenth. The Supreme Court of Colorado erred in reversing the judgment and decree of the court below that the claim of appellant to the constructive possession of the Comstock lode under his tax deed of August 8, 1892, was interrupted and destroyed by the entire cancellation of the Comstock lode and its mineral entry by the commissioner of the general land office, and that the statute of limitations could not run as against plaintiff's in error.

> "In the courts of the United States, in an action of ejectment based on a title derived from the government, the statute of limitations does not begin to run until the date of the government patent for the land."
>
> Redfield vs. Parks, 132 U. S., 239.
> Hays vs. United States, 175 U. S., 260.
> Kircher vs. Murray, 60 Fed., 52.
> Lindsay vs. Miller, 6 Pet., 666.
> Gibson vs. Choteau, 13 Wall., 92.
> Moore vs. Brown, 11 How., 414.

The Supreme Court of Colorado, in Denver & R. G. R. R. Co. vs. Wilson, 28 Colo., 14, says:

> "The authorities are, that as between rival individual claimants of land acquired from the United States government, the statute of limitations does not begin to run in

favor of an adverse claimant in possession as against an entryman until the latter, by a full compliance with the law, becomes entitled to a patent. This disposes of the plea of the bar of our statute, for the action was instituted within the period therein limited."

So, also:

South End Min. Co. vs. Tinney, 22 Nev., 228.
Steele vs. Boley, 7 Utah, 66-67.
Dorn vs. Baker, 96 Cal., 206.
Manly vs. Howlett, 55 Cal., 94.
Gardiner vs. Miller, 47 Cal., 570.
Hogan vs. Ellis, 39 Fla., 470.
Chicago & N. W. Ry. Co. vs. Arnold, 114 Wis., 434.
Campbell vs. Spears, 120 Iowa, 670.
Duncan vs. Newcomer, 9 S. Dak., 373.
Gomer vs. Chaffee, 6 Colo., 314.
Taylor vs. Miles, 5 Kan., 498.
Waterson vs. Devoe, 18 Kan., 223.
Hurd vs. Brisner, 3 Wash., 1.
Horswill vs. Farnham, 16 S. Dak., 414.
Mason vs. Crowder, 85 Mo., 526.
Sheehy vs. Hinds, 27 Minn., 259.
Cutter vs. Hurlbut, 29 Wis., 152.
Shoat vs. Walker, 6 Kan., 65.

We submit our reasons for reversing the judgment of reversal entered by the supreme court of Colorado, and upholding the decree entered for plaintiffs in error in the trial court.

TAX DEED BASED ON TAX SALE NOTICE ADVERTISED EXCLUSIVELY ON SUNDAY IS ABSOLUTELY VOID.

The seventh objection of the appellees to the introduction of the tax deed of appellant was that the notice of tax sale was published exclusively in the Sunday edition of the Leadville Herald-Democrat, was not a legal notice of the sale, was not a compliance with the statute, that a sale under such notice was void and vested no title in the purchaser, and this deed based on such void notice is absolutely void, as no such sale took place; and that the publication of such notice is the fundamental step in the process of law to deprive the citizen of his property for failure to pay taxes, and where this step is absolutely void as in this case, all proceedings thereunder were without force or effect, and the sale thereunder passed no title, and was not made by "due process of law" and by the "law of the land."

At common law and by statute in nearly every state in the United States Sunday is *Dies non Juridicus*, and therefore process cannot usually be served on that day.

Swinney vs. Johnson, 18 Ark., 534.
Scammon vs. Chicago, 40 Ill., 146.
Morris vs. Shew, 29 Kan., 661.
Moore vs. Hagan, 63 Ken., 438.
Van Vechten vs. Paddock, 12 Johns., 178.

In Schwed vs. Hartwitz, 23 Colo., 189, the supreme court of Colorado had this identical question "the tax sale notice of the year 1889 in Lake county, Colorado" up for consideration, and in sustaining the same ruling as made by Judge Palmer in this case, used the following language (page 189):

"The district court decided that the publication in a Sunday edition only was not legal notice, and that all proceedings thereunder were without force or effect. The publication of the notice of a tax sale is in the nature of the service of process. It will not be contended that outside of a few cases, specially provided for by statute, service of process on Sunday in a civil action would be valid in this state, and the rule that tax sales are invalid, if made upon a notice published only in a Sunday paper, is too well settled to be now open to controversy."

Scammon vs. City of Chicago, 40 Ill., 146.

Black Tax Titles (2nd Ed.), Sec. 210.

Blackwell Tax Titles (5th Ed.), Sec. 440.

Ormsby vs. Louisville, 79 Ky., 199.

Sawyer vs. Cargile, 72 Ga., 290.

Blackwell section 440:

"A publication on Sunday is no notice. Sunday is not a judicial day. Such publication is itself a violation of law, and no citizen is bound to read or take notice of it."

Black., Sec. 210:

"The publication is not sufficient if made on Sunday only. Citizens are not required to take notice of the contents of a Sunday newspaper."

In Sawyer vs. Cargile, 72 Ga., 290, it is said:

"Sunday is *dies non juridicus*, and service cannot be made, or legal notice given on that day, or the business or work of ordinary callings done. Therefore, the publication of

the advertisement of a marshal's sale for taxes in a newspaper appearing on Sunday was not legal, and the sale thereunder passed no title."

In Ormsby vs. Louisville, 79 Ky., 197, the court says:

"Where a city charter requires the publication of the levy ordinances as a condition precedent to a tax sale, the publication is not sufficient if made on Sunday only. Citizens are not required to take notice of the contents of a Sunday newspaper."

Brannin vs. City of Louisville, 4 Ky. Law Rep., 384.

McLaughlin vs. Wheeler, 2 S. D., 379.

In Shaw vs. William, 87 Ind., 158, it is said:

"The publication of notice of a sheriff's sale in a Sunday newspaper is void under the Sunday law."

In Scammon vs. City of Chicago, 40 Ill., 146, the court says:

"Civil process cannot be legally served on Sunday, being forbidden by Cr. Code, section 144, which prohibits any person from disturbing the peace and good order of society by labor on that day; works of necessity and charity excepted."

Absence of notice is a vital jurisdictional defect which cannot be remedied.

Black. Tax Titles, section 205:

"But it is held in all states, we believe, that the giving of notice, in the form and manner prescribed by the statute, is an essentially jurisdictional fact; that no circum-

stances will obviate the necessity of it; that the omission of notice is not a mere irregularity, but a vital defect; and that the validity of all the future proceedings depends upon a substantial (if not a literal) compliance with the law in this regard."

Blackwell, section 398:

"It may, however, be laid down as a general rule that the advertisement of the sale in the time and manner prescribed by the law is a prerequisite to the validity of a tax title. The officer derives his power of sale, in part, from the advertisement of it. Power is conferred upon him to be exercised on certain contingencies; and these contingencies must have happened and the condition on which he can act must have been performed, before his act can be valid. His power does not attach until every prerequisite of the law has been complied with."

Id., 398:

"Want of notice of sale avoids the title. It is not an 'error or defect going to the validity of the assessment and affecting the groundwork of the tax,' and so is not within the protection of the Wisconsin laws of 1880 (Ch. 309). The giving of notice in the manner prescribed by law is an essential jurisdictional fact."

Cooley Tax'n, 482-483:

"Unusual care is required in obeying the directions of the statute regarding notice, as no one who is entitled to notice can be bound by a sale which has been made without it." * * * Id.

"This is one of the most important of all the safeguards which has been deemed necessary to protect the interests of parties taxed, and nothing can be a substitute for it or excuse the failure to give it. The notice being a prerequisite to the officer's authority, the fact that in the particular case it can be shown that the party concerned was fully aware of the proceedings will be of no avail in supporting them. He is under no obligation to take notice of the proceedings unless duly notified. Mere informalities or unimportant variances in an attempt to comply with the law may not be fatal, but variance in substance cannot be overlooked."

"A tax sale is void unless the notice of sale is duly published in accordance with the requirements of the statutes."

Hodgden vs. Burleigh, 4 Fed., 111.
Johnson vs. Harper, 107 Ala., 706.
Daniel vs. Taylor, 33 Fla., 636.
Morris vs. St. Louis Nat. Bank, 17 Colo., 231.
Langlois vs. Stewart, 156 Ill., 609.
Moore vs. Brown, 52 U. S., 414.
Hill vs. Nicholson, 92 N. C., 24.
Olsen vs. Bagley, 10 Utah, 492.
Marx vs. Hanthorn, 148 U. S., 172.
Thompson vs. McLaughlin, 66 Ill., 409.
Gage vs. Kaufman, 133 U. S., 471.

It has been uniformly held that statutory provisions for advertisement of a notice of tax sale are mandatory.

Gomer vs. Chaffee, 6 Colo., 314.
Langlois vs. Stewart, 156 Ill., 609.
Early vs. Doe, 16 How., 610.
McCord vs. Sullivan, 85 Minn., 344,

the court says:

> "G. S. 1894, section 1591, requiring notice of tax sale to be given by the county auditor as therein directed is mandatory, and must be strictly complied with. A proper posting and publication of such notice is an indispensable pre-requisite to the authority of the auditor to make the sale, without which he has no jurisdiction to proceed."

That the Supreme Court of Colorado erred in refusing to sustain or even discuss in its opinion the conclusion of Judge Palmer, as stated in paragraph 8, page 14, of appellee's brief.

> "Eighth—That the forfeiture claimed by defendant under his tax deed of date August 7, 1892, of the property of plaintiffs, was not made by due process of law and under the 'law of the land,' and was in violation of and in direct contravention of section twenty-five (25) of Article two (2), Constitution of Colorado, which reads:
>
> " 'That no person shall be deprived of life, liberty, or property without due process of law.' "

And of section one (1), Article five (5), fifth amendment of the Constitution of the United States, which reads:

"Nor be deprived of life, liberty or property without due process of law."

The learned justice who prepared the opinion of that court in this case failed to consider in a single line or syllable of his opinion, the question that a notice of tax sale published exclusively on Sunday was not a legal notice of sale; was not the orderly compliance with the statute, or that a sale under such notice was absolutely void and vested no title in the purchaser, and that no such sale took place, and that the publication of such notice was a fundamental step in the process of law to deprive the citizen of his property for failure to pay taxes, and that without this step jurisdiction was lacking in the officers to create such forfeiture.

The failure of the justices sitting in the court below to even mention in their opinion, the question whether the tax deed was based upon such jurisdictional steps as constituted due process of law, and was made by, through and under the "law of the land;" establishes the fact that no proper consideration was given by the court to the real merits of the controversy.

Should this decision, reversing the judgment of the District Court of Lake county in favor of appellees, and instructing the entry of a judgment for appellant Wood for possession of the premises according to the prayer of his answer, be upheld, it would be confiscation and would be the taking of the private property of appellees without due process of law, in direct violation of and in contravention of section twenty-five (25), Article two (2), of the Constitution of Colorado, and section one (1), Article

five (5), fifth amendment, of the Constitution of the United States.

It is almost a universal proposition upon the consideration of tax deed titles, both in the *nisi prius* courts and the appellate courts, to consider first, last and all the time, whether the divestiture of title by tax sale has been made in full compliance, with the law, has been made by due process of law, and by the law of the land.

The sale upheld by this decision of the court was made without notice at all, and was in fact and legal effect no sale at all. By it no rights were divested. Under it no rights could be obtained; worthless itself, all procedings founded upon it were equally worthless; it neither binds nor bars anyone. The purchaser at the sale, by virtue of its execution, found himself without title, nor could anything resurrect it or breathe into it any elements of power, life or vitality. That which was originally void can not by mere lapse of time be made valid, and no such void claim of title by force of an act of limitation can ripen into a conclusive title.

The court in its opinion overlooked the fact that appellees proved beyond a doubt that no sale of the land covered by this suit ever occurred. The advertisement was made on a non-juridical day, and the owners of this Comstock claim were not required to take any notice of it, and the power of the officer to sell was absolutely lacking. The decree of the court below found that there was no sale, and that it required a *bona fide*, actual sale to set the statute in motion. Without a sale the statute of limitations can not avail appellant. There was nothing to bring his deed within the operation of the statute. With no

sale there was nothing for the statute to run in favor of or against, and nothing to set it in motion. Where there has been no sale of the land—no fiction of law can draw to a deed based on it—a constructive possession to start a statute of limitations running.

Every text book upon tax titles, every tax title case in the reports, and every authority upon constitutional construction, and the vast weight of common sense and judicial opinion, is against the proposition advanced by the court and upheld in this opinion, that a statute of limitations can cure the objection that an alleged tax sale in fact never took place. Such a statute would be unconstitutional, as its effect would be to deprive the owner of property without due process of law.

The court failed to even discuss or consider the appellees' contention that a tax sale without published notice is a deprivation of their property without due process of law, and that there can not be due process of law unless the notice has been published, and that court whistled the right of appellees down the wind, with a careless and reckless construction and application of these constitutional provisions invoked by appellees.

In Galpin vs. Page, 18 Wall., 350, Justice Field says:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity

> wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

It surely was a grave error for the Supreme Court of Colorado to hold, as was the practical effect of their decision, that after the court below has sustained the plea of appellees, that section 25, article 2, Constitution of Colorado, and section 1, article 5, fifth amendment of Constitution of the United States, was a shield against the void title of appellant that a legislative act of limitation can give life, health and force to such a void sale. If the legislature of this state were to enact a statute conferring the right to condemn the citizen and to forfeit his property, without any notice, and without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of these two sections of these Constitutions? This being true, as it undoubtedly is, how can it be said that the appellate judicial department of this state, the source and fountain of justice itself, has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the Constitution. If such power is reposed in the Supreme Court of Colorado, then the judicial department of this state, sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

The Supreme Court of Colorado, in

Brown vs. City of Denver, 7 Colo., 311,

discussing "due process of law," under section 25, article 2, says:

> "The doctrine of the authorities is that, whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise, at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guarantees above cited are infringed."

So, also,

Great West Min. Co. vs. Woodmas of A'ston Min. Co., 12 Colo., 55:

> "The courts have uniformly held that this requirement demands that there shall be notice and hearing before condemnation. Any proceeding which violates these principles is not 'due process of law' and is not according 'to the law of the land.' Where

the property of a citizen is taken and condemned without notice to him, it is entirely immaterial whether it be a special or general judgment, the fundamental wrong in such case being that his property is taken and conveyed to some other person without his knowledge."

Quoting:

Stuart vs. Palmer, 74 N. Y., 183.
Clark vs. Mitchell, 69 Mo., 627.

Justice Helm says, In Re Senate Bill No. 65, 12 Colo., 469:

"It is a principle declared by our Constitution (section 25, article 2), and of universal recognition, that no person shall be deprived of life, liberty or property without due process of law. But there can not be due process of law unless the party to be affected has his day in court."

Again,

Crisman vs. Johnson, 23 Colo., 264.

"A statute undertaking to obviate the objection that an alleged tax sale in fact never took place would be unconstitutional, as its effect would be to deprive the owner of property without due process of law."

We do not have to stray from the opinion of Chief Justice Elbert, in the case of

Gomer vs. Chaffee, 6 Colo., 317,

to find the only true and correct exposition of the law applicable to this case.

> "It is difficult to see how the statute of limitations can avail a defendant holding a void deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor the right of actual possession.
>
> "The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of law."

This decision of the Supreme Court of Colorado has never been reversed and is now the law of this state, and has been more frequently quoted and affirmed by the Supreme Court of the United States and the appellate courts of the other states than any other tax title case in the Colorado reports. It is the law of this state and covers every contention of the appellees made in the court below, where Judge Palmer acted in obedience to its principle, and in this court, where we have claimed the benefit of its broad and enlightened ruling.

In the opinion of Justice Maxwell, his holding is the direct reverse of the holding of Chief Justice Elbert, and he now holds that section 3904, the statute of limitations in question, applies to void proceedings in violation of law.

In this he disagrees also with

Moore vs. Brown, 4 McLean, 211, 11 How., 414.

Redfield vs. Parks, 132 U. S., 239.

Lane vs. Shepardson, 18 Wis., 59.
Shoat vs. Walker, 6 Kan., 65.
Waterson vs. Devoe, 18 Kan., 223.
Mason vs. Crowder, 85 Mo., 526.
Sheehy vs. Hinds, 27 Minn., 259.
Cutler vs. Hurlbut, 29 Wis., 152.
Wofford vs. McKinna, 23 Tex., 36.
Hurd vs. Brisner, 3 Wash., 1.
Horswill vs. Farnham, 16 S. Dak., 414.
Coulter vs. Stafford, 56 Fed., 564.
Breisch vs. Cox, 81 Penn St., 336.
Blackwell, section 919, 5th ed.
Black, section 498.
Morris vs. St. Louis Nat'l Bank, 17 Colo., 233.

It is plainly noticeable that the Supreme Court of the state of Colorado declined to reverse or even discuss the force and effect of the case of Schwed vs. Hartwitz, 23 Colo., 189. The silence of that court is an affirmance of the principle therein established. It is thus admitted that under the rule of *caveat emptor*, so strictly and rigidly applied to purchasers at tax sale, the defendant below and his grantor were bound and chargeable with full notice of the vital jurisdictional errors in this attempted tax sale of the Comstock lode; it was his duty to note the fact that the publication of tax sale was made only in a Sunday newspaper, which he or his grantor must have seen to be a bidder at the sale. It has been held that if they do not examine the records antecedent to the tax sale and shall buy land exposed to sale for taxes against the law, they do so at their own risk. They are put upon inquiry whether or not the land, as ad-

vertised for tax sale in a Sunday newspaper only, was offered for sale according to law. And the courts of law are scrupulously careful that no man shall be deprived of his property through tax proceedings that are not in all respects in substantial compliance with the statutory requirements. The trial court decided that this sale was absolutely void in its attempted notice of sale by publication upon Sunday only, and this Honorable Court should affirm that decision.

THE TAX DEED, SHOWING ON ITS FACE, IN THE CONSIDERATION EXPRESSED, THE INCLUSION OF ILLEGAL TAXES ASSESSED AGAINST UNTAXABLE, UNENTERED GOVERNMENT LAND, IS VOID UPON ITS FACE AND COULD NOT DIVEST PLAINTIFFS OF THEIR POSSESSORY RIGHT TO THIS PROPERTY.

First. That the United States still owning the fee to the land while it remained cancelled, it could not be taxed and sold.

Second. That if any part of the claim was still owned by the United States after the cancellation the incorporation of illegal taxes upon this part with other taxes levied upon the other part of the claim, rendered the whole sale void *in toto*.

Black Tax Titles, section 228, 2d ed.:

> "We desire in the first place to lay down the general rule, that land can only be sold for taxes for which it is legally liable. This is indeed axiomatic. * * * A tax sale, then, is invalid for every purpose, unless the property was at the time liable for all the taxes for which it was sold."

Id., section 230:

"One of the important principles announced by the authorities under the general rule above stated is this: If land is sold for taxes, a part of which are legal and a part illegal, the sale is void *in toto*."

Id., 230:

"Thus it is said: 'Whenever a tax is invalid because of excess authority, or because the requisites in the tax proceedings which the law has provided for the protection of the taxpayer are not complied with, any sale of property based upon it will be void also. The owner is not deprived of his property by the "law of the land," if it is taken to satisfy an illegal tax. And if the property is sold for the satisfaction of several taxes any one of which is unauthorized, or for any reason illegal, the sale is altogether void.' Silsbee vs. Stockle, 44 Mich., 561."

Id., 230:

"Or, as stated in another case, it is impossible to distinguish between that part of a tax which might have been rightly assessed, and that for which no authority is given, so that the assessment should be valid for one part and void for another. Libby vs. Burnham, 15 Mass., 144."

Concluding section 230, Judge Black says:

> "Furthermore, this defect in the proceedings *is vital and jurisdictional*. It is not a mere irregularity. It can neither be cured nor disregarded."

In Cooley on Taxation, page 497, 2d ed., the same rule is stated:

> "The statutory power is a power to sell for lawful taxes and lawful expenses, and if it is exceeded by including unlawful items of either class, the power is exceeded and its exercise is invalid *in toto* from the manifest impossibility of saving the sale in part when the invalidity extends to the whole."

Id., 497:

> "It is to be presumed when the sale has been made for a sum in part illegal, that some undefined and indefinable portion of the land has gone to satisfy an illegal demand, and that such part would not have been sold at all if only what was lawful had been called for."

In sections 518, 519 and 522, fifth edition, Blackwell on Tax Titles, these rules are set forth particularly.

> "Sec. 518. The *whole land or interest* sold must be liable for the *whole of the taxes* for which it is sold. If part of the land is

liable for the taxes and the rest not, or if the whole or a part of the taxes is really due on another tract than the one sold for them, or if the whole or any portion of the taxes is illegal, the sale is void; as where the taxes are excessive, however, small the excess."

"Sec. 519. Where a part of the land sold is liable to sale and the residue is not, the sale is void *in toto*.

"Sec. 522. Part of the taxes illegal. A tax sale is void unless all the taxes under which the sale is made are valid. Where divers taxes are assessed, some of which are legal, and the residue illegal, the sale can not be upheld *pro rata*, but the entire sale falls to the ground. The rule is, that where a grant, an instrument, or an act is void in part by the statute law, it is void for the whole."

See, also, page 836, 27 Am. & Eng. Enc. of Law, 2d Ed. :

"In the absence of validating statutes a sale of property for the satisfaction of an amount of taxes in excess of the amount lawfully due is without jurisdiction and void, both as to the illegal excess and the amount for which the sale might lawfully have been made."

Bucknall vs. Story, 36 Cal., 67, the court says, page 72.

"The invalidity of such a sale *in toto* is settled, and such invalidity will be recog-

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nized in a court of law as well as in equity. It was so held in an action to recover land. 'The entire sum' is the consideration of the deed, and this being void in part is void in whole. The property must at the time be liable for all the taxes for which it is sold, for it is impossible to separate and distinguish between them, so that the act may be in part valid and in part invalid.'"

Blackwell on Tax Titles, 192.
Elwell vs. Shaw, 1 Greenl., 339.
Drew vs. Davis, 10 Vt., 506.
McQuilkin vs. Doe, 8 Blackf., 581.
Kemper vs. McClellands Lessee, 19 Ohio, 324.
Hardenberg vs. Kidd, 10 Cal., 404.

In the latter case the law is stated:

"Property must at the time be liable for all the taxes for which it is sold; and where property was sold at one sale for both state and county taxes added together in a single sum, and the county taxes were illegally levied, the entire sale was void."

In Treadwell vs. Patterson, 51 Cal., 638, the same court says:

"The several sums amounted in the aggregate to thirty-one dollars and eleven cents; and at the tax sale the land was sold for thirty-one dollars and forty-seven cents, being an excess of thirty-six cents over the whole amount due, including costs and

charges. In such cases the rule as stated by Judge Cooley (page 344) is that 'A sale for anything more than is lawfully chargeable is a sale without jurisdiction and therefore void. In such cases the maxim, "*de minimis non curet lex*" does not apply, except in a limited sense. The rule as established by the authorities is that if the excess be as much as the smallest fractional coin authorized by law the sale is void.'

"Where a lot which had been sold to a city was assessed to private persons as a part of a number of contiguous lots owned by them, and the lots owned by the private parties were sold for taxes, without any reduction on account of illegal assessment, such sale was void."

Asper vs. Moon, 24 Utah, 241.

In Boston Tun Co. vs. McKenzie, 67 Cal., 485, it is held:

"A tax sale for an amount in excess of what is lawfully chargeable is without jurisdiction and void."

Again: Knox vs. Higby, 76 Cal., 267.

"It has been repeatedly held in this state that property can not be sold for a sum of money in excess of the tax legally due and costs."

So also: Axtell vs. Gerlach, 67 Cal., 483.

"Many authorities hold and it seems to be the settled law, that if any sum of money

in excess of the tax and legal costs enter into the consideration for which the property is sold for taxes, this fact poisons and makes void the whole proceeding and renders the sale void to the purchaser. Olsen vs. Bagley, 10 Utah, 492."

Seymour vs. Peters, 67 Mich., 415.

Fox vs. Cross, 39 Kan., 350.

In McLaughlin vs. Thompson, 55 Ill., 251, it is said:

"That tax being illegal, appellant or those under whom he claims were not required to pay it, nor did the law impose the duty of redeeming from the sale, and it has been repeatedly held that if any portion of the tax is illegal or the judgment is too large, only to the extent of *a few cents*, the sale and tax deed will be void. This being so, the tax deed conveyed no title, and hence there could be no recovery under it, as the plaintiff in ejectment must as in other cases establish his right to recover."

So, also: Riverside Co. vs. Howell, 113 Ill., 262.

"The authorities are to the effect that when a part of the tax for yhich a sale of real estate is made is illegal the sale is void."

Again: Drake vs. Ogden, 128 Ill., 603:

"The last point relied upon to defeat the sale is that the tax judgment under which the premises were sold included illegal

taxes. * * * * The levy so far as the $2,100 is concerned was illegal. The result was 19 cents was added to the taxes on one of the lots, and 27 cents to the taxes on the other lot. These amounts formed a part of the judgment for taxes upon which the premises were sold and the question arises whether such illegal taxes rendered the judgment and sale void. * * * A portion of the taxes levied was illegal, and the land was not liable for such tax. The fact that a large proportion of the tax was legal does not change the result. The illegal portion of the tax rendered the judgment and sale void. McLaughlin vs. Thompson, 55 Ill., 249, is a case in point. There it was held that if any portion of the tax upon which a judgment is rendered was illegal, or if the judgment was for too large a sum, a sale and tax deed based upon such judgment would be void. The same doctrine is announced in Riverside Co. vs Howell, 113 Ill., 256. As the real estate was not liable for the tax as levied, the judgment did not prevent appellants from relying on the illegality of the tax. We think the court erred in holding the tax sale valid, and for this error the judgment will be reversed and the cause remanded."

"A tax sale is void if any portion of the tax for which it was made was illegal."

Tillotson vs. Webber, 96 Mich., 144.
Rogers vs. White, 68 Mich., 10.
Sinclair vs. Learned, 51 Mich., 335

Hall vs. Kellogg, 16 Mich., 135.
Burroughs vs. Goff, 64 Mich., 464.
Silsbee vs. Stockle, 44 Mich., 561.

The United States courts have asserted the same rule:

California vs. Central Pac. R. Co., 127 U. S., 1.
Santa Clara Co. vs. Southern Pac. R. Co., 118 U. S., 394.
Hodgden vs. Burleigh, 4 Fed. Rep., 125.
Gage vs. Pumpelly, 115 U. S., 454.
Gamble vs. Witty, 55 Miss., 26.
Baldwin vs. Elizabeth, 42 N. J. Eq., 14.
Morris vs. Roseberry, 46 W. Va., 29.

In Cramer vs. Armstrong, 28 Colo., 496, Chief Justice Campbell follows the same rule:

"That the tax is invalid where there is an excessive sale—that is, for an amount exceeding the aggregate of the taxes, interest, penalties and charges for which the land is legally liable—is beyond question."

Black on Tax Titles (2nd Ed.), section 232.
Cooley on Taxation (2nd Ed.), 496 et seq.
Carlisle vs. Cassady et al., 46 S. W., 490.
Turner vs. Boyce, 33 N. Y. Supp., 433.

"And the deed would be void on its face if it showed the fact of such excessive sale."

Allen vs. Morse, 72 Me., 502.

"The deed is void on its face when it shows that a portion of the taxes for which the land was sold could not have been legally levied."

Wills vs. Austin, 535 Cal., 152.

THE TAX DEED, SHOWING ON ITS FACE THE INCLUSION IN THE LAND CONVEYED OF UNTAXABLE, UNENTERED GOVERNMENT LAND, IS VOID UPON ITS FACE; AND COULD NOT DIVEST PLAINTIFFS OF THEIR POSSESSORY RIGHT TO THIS PROPERTY.

The rule of law is undisputed and universal: that where property that is untaxable and in which the title still remains in the United States, is incorporated and blended in its assessment and subsequent sale, the tax deed given is absolutely void for want of power and jurisdiction to make the sale.

In this case 1.80 acres of cancelled, untaxable ground, the title to which still remained in the United States, was incorporated with the total of 9.67 acres of the claim in the assessment and tax roll of 1888 (Ex. J) one year after its cancellation by the commissioner of the general land office, May 2, 1887, and an excessive and illegal levy of 61 cents, being 18½ per cent. of the whole tax of $3.32, was entered against the total of 9.67 acres of the claim, and the sale of an undivided one-third intrest in the whole 9.67 acres of the claim was made August 5th, 1889, for the sum of $1.38, including therein the illegal sum of 25.6 cents, being 18½ per cent. of the considera-

tion named in the tax deed. These proceedings rendered the sale and tax deed absolutely void.

The rule is stated (Cooley Tax'n, 3d Ed., 1903, page 136): "But this principle (taxation of unpatented government land) will not apply in any case until the right to a patent is complete, and the equitable title fully vested in the party without anything more to be paid or any act to be done going to the foundation of the right."

In Stearns vs. Minnesota, 179 U. S., 223, December 3, 1900, page 251, Justice Brewer gives the true rule: "It has also been held that until the very last moment, that liens or equitable rights of the United States are extinguished, no matter how trivial or small may be the right or the lien reserved, the land is not subject to state taxation."

In Hussman vs. Durham, 165 U. S., 145, January 18, 1897, affirming Hussman vs. Durham, 88 Iowa, 29, Justice Brewer announces this rule: "While the title remains in the government, public lands are not subject to state taxation, and tax sales and tax deeds thereof are void; and one subsequently acquiring title thereto can contest their validity."

In Kansas Pac. R. R. Co. vs. Prescott, 16 Wall, 603, Justice Miller states the same rule: "While we recognize the doctrine heretofore laid down by this court, that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to *cases where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right.*"

Also—

Railway Co. vs. McShane, 22 Wall, 144.
U. S., 600.
Northern Pacific R. R. Co. vs. Rockne, 115
Central Colo. Imp. Co. vs. Pueblo Co.
Comm'rs, 95 U. S., 259.

In Redfield vs. Parks, 132 U. S., 239, Justice Miller gives a more forcible reason for the rule: "The foundation for this rule is the proposition that time does not run against the government; that no statute of limitation affects the rights of the government unless there is an express provision to that effect in the statute, and even then it cannot be conceded that state legislation can in this manner imperil the rights of the United States or overcome the general principle that it is not amenable to the statute of limitations or the doctrine of laches. The facts found in the present case leave it beyond question that the legal title to the property in controversy was in the United States until the issuing of the patent to the railroad company."

It must be noted in the above case that the certificate of the register of the land office—for the property in suit—was issued September 10th, 1856, and small may be the right or the lien reserved, the land the land was paid for in full on that date. The tax deed was delivered August 11th, 1871, for tax sale of 1868. Patent issued April 15, 1875. Action for possession was brought April 11th, 1882. Plea and defense of tax deed holder was the two-year and seven-year statutes of limitation of the state of Arkansas. The court held that although the action was brought over ten years and eight months after the delivery of

the tax deed, and nearly seven years after the issuance of the patent, that a void deed could not create color of title which would bring the case within such statutes.

Closing the opinion the court says:

> "We think that both the weight of authority and sound principle are in favor of the propostion that when a deed founded on a sale of taxes is introduced in support of the bar of a possession under these statutes of limitations, it is of no avail if it can be seen upon its face and by its own terms that it is absolutely void."

Citing:

> Waterson vs. Devoe, 18 Kan., 223.
> Shoat vs. Walker, 6 Kan., 65.
> Mason vs. Crowder, 85 Mo., 526.
> Sheehy vs. Hinds, 27 Minn., 259.
> Cutler vs. Hurlbut, 29 Wis., 152.
> Gomer vs. Chaffee, 6 Colo., 314.
> Wofford vs. McKinna, 23 Tex., 36.
> Moore vs. Brown, 11 How., 414.

The Circuit and District Court of the United States also hold that tax deeds and tax sales made of United States lands during the period of suspended entry and cancellation are void and the statute of limitations does not run until issue of patent.

> Pitts vs. Clay, 27 Fed. Rep., 635.
> Coulter vs. Stafford, 56 Fed. Rep., 564.
> Bronson vs. Kukuk, 3 Dill, 490.

The state courts present an unbroken list of authorities maintaining the same proposition.

Campbell vs. Spears, 120 Iowa, 670.
Duncan vs. Newcomer, 9 S. D., 375.
Scott vs. Chicasaw Co., 46 Iowa, 253.
Reynolds vs. Plymouth Co., 55 Iowa, 90.
Moriarty vs. Boone Co., 39 Iowa, 634.
Kohn vs. Barr, 52 Kansas, 269.
Calder vs. Keegan, 30 Wis., 126.

In the case of

Davis vs. Magoun, 109 Iowa, 308,

the court places the first possible date for the taxation of the cancelled entry at the date of the reinstatement of the entry.

The words "held for cancellation," by letter of the commissioner of the general land office, is a final judgment of cancellation unless appealed from.

In Murray vs Polglase, 17 Mont., 455, the court gives a definition of what that term means, page 459:

> "Respondents criticise the language 'held for cancellation,' and state that the entry was not cancelled, but only 'held for cancellation.' We are of opinion that this was simply the method of the land office and the form of expression customarily used by that tribunal in indicating its decision. Following this comes the decision of the secretary of the interior. That decision is in form of a letter to the commissioner in which the secretary says: 'Your judgment from which an appeal has been taken contains a satisfactory statement of the facts; and as no errors of law appear, said judgment is affirmed.' We are of

opinion that this decision was a judgment of cancellation."

Citing:

Perrott vs. Connick, 13 Land Dec., 598.

In 10 Land Dec., 221, Henry Gauger, Secretary Chandler, it is decided:

"A judgment rendered by your office holding an entry for cancellation is final as to your office, and an application to enter during the time allowed for appeal from such judgment should be received subject to the right of appeal, but not made of record until the rights of the former entryman are finally determined, either by the expiration of the time allowed for appeal or by the judgment of the appellate tribunal."

Citing John H. Reed, 6 L. D., 563:

"The cancellation of an entry by the order of the commissioner of the general land office takes effect as of the date when the decision is made."—Secretary Vilas.

Anderson vs. Northern Pac. R. R. Co. et al., 7 L. Dec., 163.

Perrott vs. Connick, 13 L. Dec., 598.

In Dornen vs. Vaughn, 16 L. D., 8, Secretary Chandler says:

"When the appellant failed to appeal from the decision of November 16, 1882, holding her entry for cancellation for the

tract in controversy, she acquiesced in that decision and it became final as to her said right to the land."

Oettal vs. Dufur, 22 L. D., 77.
McDonald et al vs. Hartman et al., 19 L. D., 547.
Hamilton vs. Southern Nev. G. & S. M. Co., 13 Saw., 113-117.

In the case at bar 1.80 acres of the 9.67 acres of Mineral Entry 2411 was finally cancelled as of date May 2, 1887, and remains so to the date of this argument, and the final cancellation of the entire mineral entry by letter of August 7, 1894, placed the entire entry of 9.67 acres in the class of untaxable government land of the United States. The continued errors and mistakes of the public taxing officers of Lake county in carrying this government land as taxable property upon their books and records up to the date of the institution of this suit can create no estoppel as against these plaintiffs.

When the question was directly put to Judge Palmer in the trial of this case:

"In case a judgment for possession of the 2.05 acres of ground involved in the adverse case of T. J. Cash et al. vs. Cecilia L. Wahrer et al., No. 5025 of the District Court, the Collins Lode vs. Comstock Lode, was rendered against the owners of the Comstock lode—to what extent would the tax deed of appellant serve to carry title from appellees holders of the unpatented possessory title to the appellant?"

He was compelled to answer:

"NONE AT ALL;"

and his decree was based upon such a state of facts.

When we consider the holding of the Supreme Court of the United States in the case of Redfield vs. Parks, 132 U. S., 239, where the holder of the tax deed obtained in 1871, over fifteen years after the receiver's receipt was issued as of date September 10, 1856, was not allowed to set up a statute of limitations until after the patent had issued, we can understand how readily Judge Palmer could reach his conclusion. It must be borne in mind that in the Redfield case there was no cancellation of the entry, and the record is silent as to the reasons for the long delay from September 10, 1856, until April 15, 1875. In the case at bar the entry was made December 31, 1884; the cancellation took effect May 2, 1887, and August 7, 1894, and no patent has yet issued for any part of this ground.

The Supreme Courts of Nevada and Utah have closely followed the decision of Redfield vs. Parks in the cases of

Steele vs. Boley, August 30, 1890, 7 Utah, 66-67.

South End Min. Co. vs. Tinney et al., 22 Nev., 228, Dec. 10th, 1894.

> **"Limitations do not run against one entitled to the legal title to government land until the patent by which it is granted is issued to him."**

It is a remarkable fact that, in both these cases, these opinions reversed their former opinions in the cases of

Steele vs. Boley, 6 Utah, 308.
South End Min. Co. vs. Tinney et al., 22 Nev., 19.
Section 38, Black on Tax Titles.
Section 815, Blackwell on Tax Titles.
Page 87, Cooley on Taxation.
Section 35, Desty on Taxation.

We claim the record discloses that subsequent to the order of cancellation May 2, 1887, up to order of cancellation August 7, 1894, and until the commencement of this suit, the title of the Comstock lode was part of the public domain of the United States under the following decisions:

Gibson vs. Choteau, 13 Wall., 99.
Henshaw vs. Bissell, 18 Wall., 269.
Hagar vs. Speck, 48 Cal., 408.
Gardiner vs. Miller, 47 Cal., 570.
Manly vs. Howlett, 55 Cal., 95.
King vs. Thomas, 6 Mont., 409.

Plaintiffs in error in the trial court and in the Supreme Court urged the absolute exemption of unentered mining locations held by possessory title under the mining statutes of the United States, from all state, county or other taxes, under the fourth section of the enabling act of Congress, approved March 3, 1875, for the admission of the state of Colorado, as follows:

> **"Secondly—That the people inhabiting said territory do agree and declare that they**

> forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain *at the sole and entire disposition of the United States;* and that the lands belonging to citizens of the United States residing without said state shall never be taxed higher than the lands belonging to residents thereof; *and that no taxes shall be imposed by the state on lands or property therein belonging to,* or which may hereafter be purchased by the United States."

Judge Palmer, the trial judge, sustained this contention of plaintiffs in error in his decree, and he could reach no other conclusion, for the simple, plain and unambiguous reason that mining claims held under possessory rights alone in the state of Colorado are not assessable, are not subject to tax lien, and are not subject to sale for taxes, unless they produced mineral during the year exceeding in value the sum of one thousand dollars.

These possessory rights are not assessable and taxable and subject to sale unless the mining claims come under the class of productive possessory claims, and have produced gross proceeds during the year, and sections 3 and 4 of Session Laws of 1887, pages 341-342, apply exclusively to mining claims producing mineral and as termed "gross proceeds." These two sections, 3 and 4, are the only sections providing for the assessment, taxation and sale of the possessory rights or location rights to mining claims, and they expressly limit that assessment and taxation to the fact of their producing mineral exceeding one thousand dollars in any one year.

In fact, section 5 of the same act, in defining the duties of the county clerk under the terms of the act, directly and expressly confine him in making up his list (lines 3 and 4, of section 5) to the following words:

> "The name and locality of all productive possessory claims in his county."

There is no contention in this case that the Comstock lode ever came under the class of a productive possessory claim until the year 1900, and the sale attacked in this case was made upon a flat acreage assessment in the year 1888.

The construction placed upon this statute by Judge Palmer is sustained by the uniform practice of the county assessors, county treasurers, county attorneys and county commissioners of the thirty-eight mining counties in this state; not to assess unpatented mining locations or their possessory rights unless for gross or net proceeds of ore for nearly twenty years, and by the fact that this principle of taxation of bare mining locations by flat acreage tax has never been even claimed before until in this judgment of the Supreme Court of Colorado.

The assessment and taxing right under sections 3 and 4 of that act of 1887 is not aimed at the land at all; the products, whether net or gross proceeds, are the only objective points which the statute considers as taxable, and the possessory right, which is always liable to lapse or be destroyed, is the only right the act gives a lien upon.

There is no rule of judicial construction by which it may be claimed; that the case of People vs. Hen-

derson, 12 Colo., 369, passes upon this question that a flat acreage tax may be assessed against unentered, unpatented mining possessory rights; or that it announces or advances any other proposition than the single one, that a productive mine, whether patented or not, may, under sections 3 and 4 of the act, be correctly valued for taxation under an estimate of its gross proceeds.

In Pilgrim C. M. Co. vs. Teller Co., 32 Colo., 334, there is not one line determinative of or squinting at the taxation of possessory mining rights or locations, except when they are assessed and valued under the precise limitations of sections 3 and 4 of the act upon a net output or gross proceeds valuation above one thousand dollars and classed as productive possessory claims.

We challenge the construction placed upon section 4 by Justice Maxwell (see Transcript, folios 186-188, pages 61 and 62), and assert that it does not apply to this case at all, and does not warrant his conclusion as applied to this case, that bare, unproductive mining locations, which have not been patented or entered for patent, are subject to taxation.

Not only this, but the highest judicial authority in the land, the Supreme Court of the United States, has decided the exact reverse of the position upheld in his opinion.

The rule of law is undisputed and universal, that:

> "While the title remains in the government, public lands are not subject to state taxation, and tax sales and tax deeds thereof are void; and one subsequently acquiring title thereto can test their validity."
>
> Hussman vs. Durham, 165 U. S., 145.

Hussman vs. Durham, 88 Iowa, 29.
K. P. R. R. Co. vs. Prescott, 16 Wall, 603.
Railway Co. vs. McShane, 22 Wall, 144.
North. Pac. R. R. Co. vs. Rockne, 115 U. S., 600.
Central Colo. Imp. Co. vs. Pueblo Co. Commissioners, 95 U. S., 259.
Cooley Tax'n (3d Ed.), 1903, page 136.
Pitts vs. Clay, 27 Fed. Rep., 635.
Coulter vs. Stafford, 56 Fed. Rep., 564.
Bronson vs. Keokuk, 3 Dill., 490.
Campbell vs. Spears, 120 Iowa, 670.
Duncan vs. Newcomer, 9 S. D., 375.
Scott vs. Chicasaw Co., 46 Iowa, 253.
Reynolds vs. Plymouth Co., 55 Iowa, 90.
Moriarity vs. Boone Co., 39 Iowa, 634.
Kohn vs. Barr, 52 Kan., 269.
Calder vs. Keegan, 30 Wis., 126.
Davis vs. Magoun, 109 Iowa, 308.

Under this state of facts and the law applicable to them, the entire claim of the Comstock lode was not subject to the taxing powers of the county of Lake and the state of Colorado, and that all efforts of those officers to subject the same to the process for assessment and sale for taxes was absolutely void and of no effect, and that the particular tax deed and tax sale made August 5, 1889, by the county treasurer of Lake county was no sale, and that the decree of the court

removing the cloud upon the plaintiffs' title created by such sale was correct in every particular.

The Supreme Court of Colorado has seen fit to close its eyes to the facts:

1. That the original entry, December 31, 1884, was for 9.67 acres.

2. That the cancellation of May 2, 1887, reduced this area to 7.88 acres.

3. That the final cancellation, December 12, 1894, obliterated the entire entry and related back to the preliminary cancellation, May 2, 1887.

4. That the adverse plat itself, in this case, shows an untaxed, unentered area of 1.80 acres.

5. That the adverse suit of the Idaho vs. Comstock proved the 2.05 acres of the Comstock as nontaxable.

6. That the adverse suit of the Collins vs. Comstock proved the 2.05 acres of the Comstock as nontaxable.

7. That the notice of advertisement (Transcript, folio 161, page 53), dated October 28, 1884, demonstrated that only 7.88 acres of this ground was open to patent in the names of Peter Finerty and Christian Gude.

8. That the assessment showed a valuation of $10 per acre for 9.67 acres, or $100 in all, when it should have been for 7.88 acres, or $80 in all.

9. That the tax of $1.38 contained in itself a 20 per cent. excess—arising from the untaxable area and assessment of the claim.

All these matters appear in this case, and all of them by necessary implication on the face of the deed, and Judge Palmer was able to see and act upon them in the trial of this case.

In the case of Asper vs. Moon, 24 Utah, 241, 67 Pac., 410, such commingling of area in assessment, We quote syllabus:

> "Where a lot which had been sold to a city was assessed to private persons as a part of a number of contiguous lots owned by them, and the lots owned by the private parties were sold for taxes, without any deduction on account of the illegal assessment, such sale was *void*."

The strict rule of construction maintained as the law in the case at bar—if sustained by this court—would never permit the proof in a case after the term of the statute had expired, that the land was not taxable, that the land was not in the limits of the county in which it was taxed, that the treasurer, whose name was signed to the deed, was actually dead at the date of the execution of the deed, that the treasurer had forfeited and lost his office at the date of the deed, and, as in this case, that the title remained in the United States and was untaxable until a receiver's receipt was issued to some one of the contesting claimants to this Comstock lode.

It never seems to have occurred to the court of what the face of a tax deed imports; that the form of a tax deed is in every and all cases exactly alike, being prescribed by statute; that the only insertions by the treasurer must be the dates, the consideration, the description of the property and the execution. All errors, whether absolutely void and unbarred by the statute, or merely informalities voidable during the term of the statute, must occur in these insertions alone, and necessarily, from the nature of the case, the attack is confined exclusively to these insertions,

which cover but a small portion of the face of the deed, and the court's inquiry must in all cases include identification of the land.

Let us state a concrete case: The lots of the United States postoffice building in Denver adjoin the lots of the Tabor Opera House; by an error like the one in this case, the numbers of all these lots are assessed in the same name and sold together; a deed is made to a tax purchaser; the years of the present seven-year limitation roll by, and the tax deed is called in question, upon the ground that the lots belonging to the United States were not taxable under the laws of this state and the United States. The very statement of this case shows the fallacious construction of the court in disputing what we have claimed in this case, and what Judge Palmer decided below. The simple identification of the postoffice lots as government property would render the deed absolutely void on its face, and the inclusion of the illegal taxes in the consideration would render the deed void on its face. And no statute of limitation could validate the tax deed to the other lots short of twenty-one years adverse occupation under the tax deed.

The necessary and complete identification of over 20 per cent. of the total area of 9.67 acres—described in the assessment list; the tax sale advertisement and the tax deed, as unentered public domain, no part of which was sold by the government of the United States, too clearly settles the contention of plaintiffs in error that the face of the tax deed showed this patent invalidity.

PLEA IN BAR FIVE-YEAR LIMITATION, SECTION 3904, M. A. S., NOT AVAILABLE TO APPELLANT.

1. Until patent issues for the land from the United States the statute can not be pleaded.

2. Appellees have proved that no sale took place.

3. Deed being absolutely void for lack of power and jurisdiction in the officers to tax and to sell, statute does not run.

Defendant in error claims that section 3904, M. A. S., which reads:

> "No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding * * *"

constitutes an absolute bar to any recovery in this case.

We desire at the outset of this discussion to deny that defendant in error ever was in actual possession of the premises—as claimed by counsel for appellant on page 7 of his brief—with this exception and proviso: that on or about December 1, 1900, appellant entered upon said property, through and under a lease from Anna L. Finnerty, Cecilia L. Wahrer and Mary M. Bullard, defendants herein, owners of an undivided two-thirds interest of the Comstock lode, said lease being dated November 1, 1899, and recorded September 13, 1900, in book 167, page 177; that this entry was made by the Ibex Mining Company; was made

at a point 700 feet underground from said company's property adjoining the Comstock lode—all of which was subsequent to this suit.

All of the allegations and admissions in support of the claim of actual possession of appellant made by his counsel on page 7 of his brief, are contained in allegations fifth and sixth of the original complaint in this case, and are confined entirely to the period subsequent to the date of June 19, 1897, when appellant, with the other defendants, Anna L. Finnerty, Mary M. Bullard and Cecilia L. Wahrer, filed a supplemental application for United States patent for the portion of the Comstock lode embraced in abandoned U. S. survey No. 667, Idaho lode.

The court below found that the section 3904 could not be pleaded by appellant as a bar.

That the tax deed was absolutely void for jurisdictional defects, and that the taxing officers were without power and jurisdiction to sell the property, and that a deed clearly void for jurisdictional defects going to the power and jurisdiction of the taxing officers will not set the statute running.

First—Because there was no sale of the land.

The publication of notice of sale is an essentially jurisdictional fact; the officers' power of sale depends upon this notice and advertisement; where there is no notice there is no sale.

> Black Tax Titles, section 205 (2d ed.).
> Blackwell Tax Titles, section 398 (5th ed.).
> Cooley Tax'n, 482-483 (2d ed.).

Judge Blackwell says (section 919, 5th ed.):

"Jurisdictional defects not cured. The Iowa Code, section 902, provides that 'no action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded.' It is *only* where the land has been sold for taxes that the statute applies; and if there was no levy, or no assessment, or no sale, the bar does not effect."

Citing:

Case vs. Albee, 28 Iowa, 277.
Early vs. Whittingham, 43 Iowa, 167.
Id., section 920.

"This section undertakes to bar actions only where the land 'has been sold for the non-payment of taxes.' If there never has been in fact any *sale* of the land for delinquent taxes, the owner is not concluded by the tax deed or any recital therein, from showing this fact."

McNamara vs. Estis, 22 Iowa, 246.

Section 498, Black on Tax Titles:

"It must be evident that there are a number of objections that might be urged against tax titles, of such a character that they can not be obviated or cured by the running of the statute of limitations, inasmuch as the effect would be to deprive the owner of his property without color of law and upon void proceedings. Thus in an action where

the bar of the statute is relied upon as a defense evidence may be given to show that no sale in fact ever took place."

Citing:

Case vs. Albee, 28 Iowa, 277.

Id., section 498:

"Again, the want of a proper and sufficient notice of the tax sale is a defect which prescription can not heal."

Urquhart vs. Westcott, 65 Wis., 135.
Morrow vs. Lander, 77 Wis., 77.
Townsend vs. Martin, 55 Ark., 192.

In Schwed vs. Hartwitz, 23 Colo., 189, this court says:

"The rule that tax sales are invalid, if made upon a notice published only in a Sunday paper, is too well settled to be now open to controversy."

Crisman vs. Johnson, 23 Colo., 271.

"It will, of course, be admitted that there are some objections against tax titles that can not be obviated by statute, as the effect would be to deprive the owner of property without due process of law. Among illustrations of defects of this nature may be enumerated instances where the property sold was not within the jurisdiction of the tax district, *or that the sale in fact never took place;* but as a general rule, all questions with reference to tax proceedings, except such as go to the power and jurisdiction of the taxing

officers, or the fraud and misconduct of the parties, are barred by the statute."

So, also:

Morris vs. St. Louis Nat'l Bank, 17 Colo., 233.

"Where by proper averment and evidence it is affirmatively shown that proper notice of a sale has not been given, or that the proof of such notice has not been made in substantial conformity with the statute, the sale will be adjudged invalid notwithstanding a tax deed, in proper form, may have been duly executed and recorded.

"A tax sale is of no effect if made without any notice to any person in interest."

Moore vs. Brown, 11 How., 414.

Hill vs. Nicholson, 92 N. C., 24.

Olsen vs. Bagley, 10 Utah, 492.

"A tax sale is void unless the notice of sale is duly published in accordance with the requirements of the statute."

Hodgdon vs. Burleigh (C. C.), 4 Fed., 111..

Johnson vs. Harper, 107 Ala., 706.

Daniel vs. Taylor, 33 Fla., 636.

"Where a list of lands returned delinquent for non-payment of taxes is not published as the law requires prior to the sale, the sale of the lands for such taxes is void."

Thweatt vs. Howard, 68 Ark., 426.

"It is absolutely essential to the validity of a tax sale that the land should have

been advertised as provided by Code, section 576."

Johnson vs. Harper, 107 Ala., 706.

In Ormsby vs. Louisville, 79 Ky., 199, and Sawyer vs. Cargile, 72 Ga., 290, a Sunday advertisement of tax sale notice is called no notice at all, and a sale attempted to be made based on such notice is no sale.

The sale relied upon without notice in the case at bar is then, in fact, and in legal effect, no sale at all. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless; it neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The purchaser at the sale by virtue of its authority finds himself without title, nor can anything resurrect it or breathe into it any elements of power, life or vitality. That which was originally void can not by mere lapse of time be made valid, and no such void claim of title by force of an act of limitation can ripen into a conclusive title.

Plaintiffs in error, appellees below, proved beyond a doubt that no sale of the land covered by this suit ever occurred. The advertisement was made on a non-juridical day, and the owners of this Comstock claim were not required to take any notice of it, and the power of the officer to sell was absolutely lacking.

How, then, can counsel claim the bar of the statute, section 3904, M. A. S., when he has failed in his proof that this land was "sold for taxes?" Indeed, the decree of the court below found there was no sale and that it required a *bona fide*, actual sale to set the

statute in motion. Without a sale the statute of limitations can not avail appellant; there was nothing to bring his deed within the operation of the statute; with no sale there was nothing for the statute to run in favor of or against, and nothing to set it in motion. Where there has been no sale of the land—no fiction of law can draw to a deed based on it—a constructive possession to start a statute of limitations running.

Second—Because the land embraced in the tax deed was not subject to taxation.

It is plain that of the 9.67 acres covered by the Mineral Entry Certificate 2411, Comstock lode, of date December 31, 1884, 1.80 acres was absolutely cancelled by the commissioner of the general land office by letter of May 2, 1887, and that it so remains to this date, and that this ground so cancelled could not be taxed under section 2823, General Statutes 1883, being section 3775, M. A. S., for the simple reason that it was not "entered." The subsequent final cancellation of the entire Mineral Entry No. 2411, by commissioner's letter of August 7, 1894, removed the entire territory of the Comstock lode from the classification of "entered land" under section 2823, and no part of this claim was subject to taxation.

Section 497, page 634, Black on Tax Titles:

> "Hence the statute will not run in favor of a deed which is void because the land was not taxable and the state had no power to tax it."

Section 927, Blackwell on Tax Titles, in Taylor vs. Miles, 5 Kan., 498:

"The deed was held absolutely void on the ground that the land was not subject to taxation; and a distinction was taken between a deed void, or voidable for some irregularity merely—which it was admitted was sufficient to set the statutes of limitations running—and one absolutely void, as in that case. This whole doctrine (it was said in this case) rests upon a constructive change of possession. * * * A void tax deed can neither create title nor draw to its holder the constructive possession of the property. It is void for all purposes. The original owner still continues to hold the absolute and paramount title both in law and equity, and to hold the constructive possession of the property."

Moore vs. Brown, 11 How., 414.
Lane vs. Shepardson, 18 Wis., 59.
Shoat vs. Walker, 6 Kan., 73.
Waterson vs. Devoe, 18 Kan., 223.
Cutler vs. Hurlbut, 29 Wis., 152.
Hall vs. Dodge, 18 Kan., 277.
Sheehy vs. Hinds, 27 Minn., 259.
Chicago & N. W. R. R. Co. vs. Arnold, 114 Wis., 434.
Horswill vs. Farnham, 16 S. D., 414.

Third—Because upon the face of the deed it appears that unpatented government land for which no receiver's receipt was issued was embraced in the property attempted to be conveyed by the deed.

Sixth—Because it has been decided that statutes of limitations do not run against one entitled to the

legal title to government land until the patent by which it is granted is issued.

The decisions are almost uniform that the short statute of limitations does not run against a deed void on its face.

Redfield vs. Parks, 132 U. S., 239.
Moore vs. Brown, 11 How., 414.
Coulter vs. Stafford, 56 Fed., 564.
Gomer vs. Chaffee, 6 Colo., 314.
Waterson vs. Devoe, 18 Kan., 223.
Hurd vs. Brisner, 3 Wash., 1.
Horswill vs. Farnham, 16 S. Dak., 414.
Mason vs. Crowder, 85 Mo., 526.
Sheehy vs. Hinds, 27 Minn., 259.
Cutler vs. Hurlbut, 29 Wis., 152.

Our contention is unassailable that under a tax deed so absolutely void as this one for numerous jurisdictional errors going to the power and authority of the officers to make the sale, no adverse possession of land can be acquired while the title is still in the United States government, and that that short statute of limitations set up as a bar in this case by adverse constructive possession can not commence to run against the owner until the patent issues.

The case of Redfield vs. Parks, 132 U. S., 239, was a case on all fours with the case at bar; a receiver's receipt issued September 10, 1856; a tax sale in 1868; a tax deed August 11, 1871; patent issued April 15, 1875; suit to recover possession April 11, 1882. Plea of statutes of limitations of Arkansas of two and seven years.

Justice Miller says, page 241:

> **"It is apparent from the finding of the facts that the action, which was commenced**

on the 11th day of April, 1882, was within the seven years allowed by the statute of the time that the cause of action accrued, if that is to be computed from the 15th day of April, 1875, the date of the patent introduced by plaintiff. That such is the law in regard to the action of ejectment in the courts of the United States has been repeatedly decided. The foundation of this rule is the proposition that time does not run against the government; that no statute of limitations affects the rights of the government unless there is an express provision to that effect in the statute, and even then it can not be conceded that state legislation can in this manner imperil the rights of the United States or overcome the general principle that it is not amenable to the statute of limitations or the doctrine of laches. The facts found in the present case leave it beyond question that the legal title to the property in controversy was in the United States until the issuing of the patent to the railroad company."

Citing:

Lindsey vs. Miller, 31 U. S., 6 Pet., 666.
Gibson vs. Choteau, 80 U. S., 13 Wall., 92.
Moore vs. Brown, 11 How., 414.
Trustees Ky. Sem. vs. Payne, 3 T. B. Mon., 121.
Waterson vs. Devoe, 18 Kan., 223.
Shoat vs. Walker, 6 Kan., 65.
Gomer vs. Chaffee, 6 Colo., 314.
Mason vs. Crowder, 85 Mo., 526, etc.

Id.: "We think that both the weight of authority and sound principle are in favor of the proposition that when a deed founded on a sale for taxes in introduced in support of the bar of a possession under these statutes of limitations, it is of no avail if it can be seen upon its face and by its own terms that it is absolutely void."

The Supreme Courts of Nevada and Utah have established this proposition in

Steele vs. Boley, August 30, 1890, 7 Utah, 66-67.

South End M. Co. vs. Tinney et al., December 10, 1894, 22 Nev., 228.

In Dorn vs. Baker, September 17, 1892, 96 Cal., 206, the Supreme Court of California announces the same principle:

Syl.: "The purchaser at a tax sale of land held under a certificate of purchase from the state acquires only an equitable title, and the certificate holder, on subsequently completing his purchase and procuring a patent, may recover the land in ejectment against the tax purchaser, where no equitable defense was pleaded."

And the court says (page 210):

"The statute of limitations did not begin to run until the patent was issued, and there can be no pretense, therefore, that the cause of action was barred."

Manley vs. Howlett, 55 Cal., 94.

The Circuit and District Courts of the United States also hold that tax deeds and tax sales made of United States lands during the period of suspended entry and cancellation are void and the statute of limitations does not run until issue of patent.

Pitts vs. Clay, 27 Fed., 635.
Coulter vs. Stafford, 56 Fed., 564.
Bronson vs. Keokuk, 3 Dill, 490.

The state courts hold the same:

Campbell vs. Spears, 120 Iowa, 670.
Duncan vs. Newcomer, 9 S. D., 375.
Scott vs. Chicasaw Co., 46 Iowa, 253.
Reynolds vs. Plymouth Co., 55 Iowa, 90.
Moriarty vs. Boone Co., 39 Iowa, 634.
Kohn vs. Barr, 52 Kan., 269.
Calder vs. Keegan, 30 Wis., 126.

Justice Campbell says, in Denver & R. G. R. R. Co. vs. Wilson, 28 Colo., 14:

> "The authorities are, that as between rival individual claimants of land acquired from the United States government, the statute of limitations does not begin to run in favor of an adverse claimant in possession as against an entryman until the latter, by a full compliance with the law, becomes entitled to a patent. This disposes of the plea of the bar of our statute, for the action was instituted within the period therein limited."

This rule is absolutely unattacked in the decisions, that public lands are not taxable so long as a

condition precedent to the acquisition of title from the United States by the grantee remains unfulfilled, and this rule has been strictly enforced in numerous cases of suspended and cancelled entries in the land department of the United States.

Duncan vs. Newcomer, 9 S. Dak., 375.

"Where a homestead entry on government land was changed into a cash entry, which was suspended, and the proof of residence finally rejected by the United States land department, necessitating the making of new proof thereafter, on which the patent issued, the land did not become taxable under state authority until the second proof was made."

In the case of Campbell vs. Spears, decided May 25, 1903, 120 Iowa, 670, the Supreme Court of Iowa announces this principle:

"Where public land was sold for taxes assessed thereon against the entryman, while a contest was pending before the United States land office, and before a patent was issued to another, during which time the land was not taxable, tax deeds issued in pursuance of such sales were void."

Citing:

Moriarity vs. Boone County, 39 Iowa, 634.

Scott vs. Chickasaw Co., 46 Iowa, 253.

Reynolds vs. Plymouth Co., 55 Iowa, 90.

"Land, the title to which is in the general government, is not taxable, and a purchaser at a tax sale of such land acquires no title thereto."

Young vs. Charnquist, 114 Iowa, 116.

The United States Supreme Court and the federal courts have held the same.

Railway Co. vs. Prescott, 16 Wall., 603.
Railway Co. vs. McShane, 22 Wall., 444.
Hussman vs. Durham, 165 U. S., 147.
Bronson vs. Keokuk, 3 Dill., 490.
Pitts vs. Clay, 27 Fed., 635.

"Lands entered under the homestead laws of the United States can not be sold for taxes before a patent is perfected."

Hoskins vs. Illinois Cent. R. Co., 78 Miss., 768.

Also:

Calder vs. Keegan, 30 Wis., 126.
Donovan vs. Kloke, 6 Neb., 124.
Taylor vs. Miles, 5 Kan., 498.
Kohn vs. Barr, 52 Kan., 269.
1 Desty Tax'n, page 35.
Black Tax Titles, 38.
Section 815, Blackwell Tax Titles.
Cooley on Taxes, 87.

The state of Pennsylvania was the first to pass the short statute of limitations for suits on tax deeds, passing the five-year statute in 1804. As the Colorado statute was originally taken from that of Pennsylvania, the ruling of the Supreme Court of Pennsylvania

upon its limitations and extent should have some controlling influence upon our views of the statute.

In Breisch vs. Cox, 81 Pa. St., 336, that court says:

> "The five years' limitation in the act of 1804 is not a bar to a recovery against a tax sale, void for want of jurisdiction."

Gardiner vs. Miller, 47 Cal., 570, it is held:

> "The statute of limitations of California has no application to the title of a patentee anterior to the issuance of the patent."

So, also,

Henshall vs. Bissell, 18 Wall, 255.

In Chicago & N. W. Ry. Co. vs. Arnold, 114 Wis., 434, the court says:

> "In the absence of the statute the result would be the same. The land being exempt from taxation, there was a want of authority *ab initio* to set the machinery of taxation in motion, or, in other words, there was no jurisdiction on the part of the taxing officers. Where such is the case, this court has held that there is nothing for a statute of limitation to act upon."

Fourth—Because upon the face of the deed it appears in the consideration expressed of one dollar and thirty-eight cents, illegal taxes assessed against unpatented government land, for which no receiver's receipt was issued, were blended with other taxes.

Fifth—Because, while the receiver's receipt remained cancelled by leters of the commissioner of the

general land office, dated May 2, 1887, and August 7, 1894, the property was not taxable under the laws of the state of Colorado.

Black Tax Titles, 228-230 (2d Ed.).
Cooley Tax'n, page 497 (3d Ed.).
Blackwell Tax Titles, sections 518-519-522 (5th Ed.).
27 Am. and Eng. Enc. Law, page 836 (2d Ed.).
Libby vs. Burnham, 15 Mass., 144.
Silsbee vs. Stockle, 44 Mich., 561.
Bucknall vs. Story, 36 Cal., 67.
Elwell vs. Shaw, 1 Greenl., 339.
Drew vs. Davis, 10 Vt., 506.
McQuilkin vs. Doe, 8 Blackf., 581.
Kemper vs. McClelland's Lessee, 19 Ohio, 324.
Hardenburg vs. Kidd, 10 Cal., 404.
Treadwell vs. Patterson, 51 Cal., 638.
Thayer vs. Mayo, 34 Me., 139.
Grosvenor vs. Cheney, 48 Me., 368.
Boston Tun. Co. vs. McKenzie, 69 Cal., 485.
Knox vs. Higby, 76 Cal., 267.
Axtell vs. Gerlach, 67 Cal., 483.
McLaughlin vs. Thompson, 55 Ill., 251.
Riverside Co. vs. Howell, 113 Ill., 262.
Drake vs. Ogden, 128 Ill., 603.
Hall vs. Kellog, 16 Mich., 135.
Sinclair vs. Learned, 51 Mich., 335.
Rogers vs. White, 68 Mich., 10.
Tillotson vs. Webber, 96 Mich., 144.
Cal. vs. Central Pac. R. R. Co., 127 U. S., 1.
Santa Clara Co. vs. So. Pac. R. R. Co., 118 U. S., 394.

Gage vs. Pumpelly, 115 U. S., 454.
Hodgden vs. Burleigh, 4 Fed. Rep., 125.
Gamble vs. Witty, 55 Miss., 26.
Carlisle vs. Cassady, 46 S. W., 490.
Turner vs. Boyce, 33 N. Y. Supp., 433.
Cramer vs. Armstrong, 28 Colo., 496.

"Furthermore, this defect in the proceedings is VITAL AND JURISDICTIONAL. It is not a mere irregularity. It can neither be cured nor disregarded."

Sec. 230, Black Tax Titles:

"The deed is void on its face when it shows that a portion of the taxes for which the land was sold could not have been legally levied."

Wills vs. Austin, 53 Cal., 152.

"When there are jurisdictional defects in a tax proceeding, the recording of a tax deed issued pursuant to a sale for such tax will not set limitations running in favor of the party claiming under such deed, and it is immaterial whether such facts appear on the face of the deed or *aliunde*."

Roberts vs. First Nat. Bank, 8 N. D., 504.

"And the deed would be void on its face if it showed the fact of such excessive sale."

Allen vs. Morse, 72 Me., 502.

"A tax deed void on its face will not set in motion the statute of limitations of three years (Act March 30, 1872, section 221. 2 Wag., S., page 1207), for recovering land of a tax purchaser."

Smith vs. H. D. Williams Cooperage Co., 110 Mo. App., 153.

"A tax deed void in its inception will not support a plea of limitation under the act of 1885 (2 Mills, section 3904), which provides that no action for the recovery of land sold for taxes shall lie, unless it be brought within five years after the execution and delivery of a deed by the treasurer."

Brinker vs. U. P., D. & G. Ry. Co., 11 C. A., 166-170.

The Supreme Court of Colorado says, in Gomer vs. Chaffee, 6 Colo., 314-317:

"It is difficult to see how a statute of limitations can avail a defendant holding a void deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor the right of actual possession. The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of law."

Black Tax Titles, section 497 (2nd Ed.).

"The provisions of a statute of limitations, to the effect that an action for the recovery of real property sold for taxes can only be commenced within a certain number of years from the date of the recording of the deed, will not run in favor of a tax deed that is void on its face, even when the land intended to be conveyed by the tax deed has been in the actual, open and notorious possession of the holder of the void deed during the whole of the statutory period."

Citing:

Daniels vs. Case, 45 Fed., 843.
Hall vs. Dodge, 18 Kan., 277.
Nichols vs. McGlathery, 43 Ia., 189.
Towle vs. Holt, 14 Neb., 221.
Moore vs. Brown, 4 McLean, 211.
Wofford vs. McKinna, 23 Tex., 36.
Shoat vs. Walker, 6 Kan., 65.
Early vs. Whittingham, 43 Ia., 162.
Waterson vs. Devoe, 18 Kan., 223.
Sheehy vs. Hinds, 27 Minn., 259.
Cutler vs. Hurlbut, 29 Wis., 152.
Redfield vs. Parks, 132 U. S., 239.

"The provision of 2 Wag. St., page 1207, section 221, that suit against a tax sale purchaser for the recovery of lands sold for taxes shall be commenced within three years from the time of recording the tax deed does not apply to a tax deed void on its face."

Mason vs. Crowder, 85 Mo., 526.
Pearce vs. Tittsworth, 87 Mo., 635.
Callahan vs. Davis, 90 Mo., 78.
Duff vs. Neilson, 90 Mo., 93.
Hopkins vs. Scott, 86 Mo., 140.
Kinney vs. Forsythe, 96 Mo., 414.

"Comp. Laws, section 1640, requiring actions to recover possession of land sold for taxes to be brought within three years after the recording of the tax deed, does not apply when the deed is void on its face."

Hegar vs. De Groat, 3 N. D., 354.
Farnham vs. Jones, 32 Minn., 13.

"The limitation of three years from the time a tax deed is recorded prescribed for suit by the former owner to recover land which has been sold and conveyed by deed for non-payment of taxes, does not run where the deed is void on its face."

Salmer vs. Lathrop, 10 S. D., 216.
Hurd vs. Brisner, 3 Wash., 1.

The cases of Sullivan vs. Collins, 20 Colo., 528, and Williams vs. Conroy, 83 Pac., 959, can be no authority for the decision of the Supreme Court of Colorado, since in both cases the fee simple title by United States patent had passed out of the government of the United States.

The Supreme Court of Colorado ignores entirely the case of Gomer vs. Chaffee, 6 Colo., 317, and relies in its opinion exclusively upon the case of Williams vs. Conroy, 83 Pac., 959, Colo. Sup., and quotes ex-

tensively from that opinion to support the reversal of the decree and the direction for the entry of a judgment for Appellant Wood.

When counsel first read and examined the Williams vs. Conroy case, the statement and the opinion of the court led him to believe that the tax deed upheld was a voidable one for informalities and irregularities only which could be cured by section 3904, Mills, and we accepted without question the statement of the court (page 960),

> "that the plaintiff's tax deeds are regular and valid on their face, though because of informalities in the sale they are as a matter of law void."

We examined the abstract in the case as filed in the Supreme Court and made the remarkable discovery that the tax deed was absolutely void on its face, and that Justices Campbell and Gunter, with Chief Justice Gabbert, had committed a glaring miscarriage of justice in reversing the decree below and entering judgment for the plaintiff.

On page 27 of the abstract in the case of Williams vs. Conroy, in the second paragraph of the stipulation, it appears that the tax sale occurred June 2, 1890, and that the tax deed was executed by the treasurer January 15, 1893, being a period of four months and nineteen days before the period of three years redemption had expired. The first possible day upon which the treasurer of Las Animas county would have had any power to execute this deed would have been June 3 or 4, 1893.

The decree of Judge Northcutt in the Williams vs. Conroy case (page 23 of Abstract, paragraph 2)

expressly finds the same facts in the following language:

> "That on or about the 2d day of June, A. D. 1890, said property was sold for taxes by the treasurer of Las Animas county, and that thereafter and on or about the 15th day of January, A. D. 1893, the then treasurer of said county issued two certain treasurer's deeds purporting to convey said property under the tax sale."

Under the rule announced in Gomer vs. Chaffee, 6 Colo., 317, the officer having no power to execute the deed until after June 2, 1893, the deeds upon the 15th of January, 1893, were premature and void. The tax deed bore on its face the evidence of this noncompliance with a substantial requisite of the law and was a nullity.

In Gomer vs. Chaffee, 6 Colo., 317, Justice Elbert says:

> "It is difficult to see how the statute of limitations can avail a defendant holding a *void* deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor the right of actual possession. The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of the law."

Citing—

Moore vs. Brown, 11 Howard, 414.

Lane vs. Shepardson, 18 Wis., 59.
Shoat vs. Walker, 6 Kan., 73.

Not one line in the statement of the Williams-Conroy case or in the opinion of Justice Campbell betrays the fact that the treasurer of Las Animas county made this deed four months before he had power to do so; it was undoubtedly the sole reason why Judge Northcutt declared the tax deed void, and being the central turning point of the case, as we say, the *crux* of the action, it was inexcusable for the court to refuse to mention and discuss it. The opinion of Judge Elbert in the Gomer-Chaffee case should have been re-written in the Williams-Conroy case, and it would be what the law is not only in this state but under all the decisions of the United States upon a similar state of facts.

We therefore challenge the authority of the Williams vs. Conroy case and respectfully request this Honorable Court to disregard it, and to refuse to apply its authority in the decision of this case. One miscarriage does not justify the infliction of another miscarriage when the court was properly advised.

Counsel advised the Supreme Court of Colorado in the petition for re-hearing of the palpable error and the misleading statement of facts occurring in the Williams vs. Conroy case, and the glaring injustice, the application of such an erroneous decision and such a totally different class of case, became against the rights of appellees below. In both the original argument and the consideration of the petition for re-hearing and transfer to the court *en banc*, the appellees seem to have been given no favors. We have stated the facts at the foundation of the Wil-

liams vs Conroy case, and submit to the Honorable Court that its principle has no application to the case at bar.

We have claimed throughout our original brief, as was held by Judge Palmer in his decree below, that the defects in appellant's tax deed were vital and jurisdictional; that they were not mere irregularities which time or a statute of limitations could cure or validate.

In Brinker vs. U. P., D. & G. R. Co., 11 Colo. App., 166, the court has said:

> "A tax deed void in its inception will not support a plea of limitation under the act of 1885 (2 Mills, section 3904), which provides that no action for the recovery of land sold for taxes shall lie, unless it is brought within five years after the execution and delivery of a deed by the treasurer."

To claim that a constructive possession under a void tax deed would be a bar under section 3904, M. A. S., this court must in some way pass upon the question of to what extent the cancellation of the entire mineral entry by the commissioner of the land office August 7th, 1894, and so holding until December 21, 1896, interrupts and destroys the constructive possession of appellant.

An inspection of appellant's tax deed shows that unentered, unpatented, untaxable government land, held by possessory rights, was included in the acreage described in the deed. This is a jurisdictional error so vital that it renders the tax deed void upon its face.

It has never been held in any decision, until the one handed down by Division No. 2 in this case, that

a void deed, so utterly beyond the jurisdictional power of the taxing officers to make, could by force of the validating effect of a statute of limitations extinguish and bar the title of appellees. Any such statute would be absolutely unconstitutional and would deprive the appellees of their property without "due process of law" and contrary to the "law of the land."

Section 452, Black on Tax Titles, states the true rule:

> "Any statute is unconstitutional which attempts to make a tax deed conclusive evidence as to jurisdictional facts, or facts vital to the exercise of the power of taxation or sale, as distinguished from such facts as are merely formal, or of routine, or pertaining to the regularity or the manner of the exercise of such power."

> Id., 452. "So any statute which should attempt to cure such substantial defects, or should attempt to debar the owner from proving, in defense or assertion of his right, that a pretended tax sale was wanting in any of the essential pre-requisites, would violate the Constitution and could not be enforced."

Section 368, Cooley's Constitutional Limitations, gives the reason of the rule, as follows:

> "In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with

> rogues to rob the citizen of his property; witnesses may testify or officers certify falsely; and records may be collusively manufactured for dishonest purposes; and that legislation, which would preclude the fraud or wrong being shown and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property."

Section 497, Black on Tax Titles, states the true rules when a void statute of limitations will not support the statute in the following language:

> "The statute, it is said, applies only where the sale was made by virtue of some law, and not to cases where an inspection of the title shows that the sale was not made in conformity to any existing law. Hence the statute will not run in favor of a deed which is void because the land was not taxable and the state had no power to tax it."

The rule of law is undisputed and universal: that where property that is untaxable, and in which the title still remains in the United States, is incorporated and blended in its assessment and subsequent sale, the tax deed given is absolutely void for want of power and jurisdiction to make the sale, and our contention is unassailable that under a tax

deed so absolutely void as this one for numerous jurisdictional errors going to the power and authority of the officers to make the sale, no adverse possession of land can be acquired while the title is still in the United States government, and that the short statute of limitations set up as a bar in this case by adverse constructive possession cannot commence to run against the owner until the patent issues.

All the authorities upon taxation and tax titles concur in asserting the universal abhorrence of the courts for all forfeitures, and the uniform disposition on their part to put a strict construction upon revenue laws which deprive the citizen of his property for a tax so infinitesimally less than its value.

Defendant in error is an intruder, by force and virtue of a void tax deed, he claims unentered, unpatented government land by such devestiture of plaintiffs in error possessory rights under the mining statutes of the United States, and attempts to maintain an application for patent in the United States land office—to further strengthen, enlarge and confirm his title, all this against the rights of plaintiffs in error, deraigned without interruption from the original locators.

The District Court of Lake county, after a careful, painstaking hearing of this case, decided that the rules of law as stated by the Supreme Court of Colorado in the cases of

Gomer vs. Chaffee, 6 Colo., 314,
Schwed vs. Hartwitz, 23 Colo., 189,
Denver & Rio Grande R. R. Co. vs. Wilson, 28 Colo., 14,

and as stated by the Supreme Court of the United States in

Redfield vs. Parks, 132 U. S., 239,
Hussman vs. Durham, 165 U. S., 145,
Moore vs. Brown, 11 How., 414,
Kansas Pac. R. R. Co. vs. Prescott, 16 Wall., 603,
Marx vs. Hauthorn, 148 U. S., 172,

and in such state cases as

Hussman vs. Durham, 88 Iowa, 29,
Steele vs. Boley, 7 Utah, 66,
South End M. Co. vs. Tinney, 22 Nev., 228,
Campbell vs. Spears, 120 Iowa, 670,
Duncan vs. Newcomer, 9 S. D., 375,
Dorn vs. Baker, 96 Cal., 206,
Kohn vs. Barr, 52 Kan., 269,

were controlling and determinative of the issues of fact and law presented in this case, and his decree was that the tax proceedings, tax sale and tax deed, executed by the officers of Lake county and relied upon by defendant in error, utterly failed to divest and forfeit the possessory title of plaintiffs in error to their interest in the Comstock lode mining claim.

We request that this case may be set for oral argument.

We respectfully submit that for the reasons set forth herein the Supreme Court of Colorado erred in reversing the decree and judgment of the District Court of Lake county, Colorado, entered in favor of plaintiffs in error, and in directing a judgment for defendant in error.

We therefore pray that the judgment and decree of the District Court of Lake county, entered in this case, be affirmed and upheld as rendered.

Respectfully submitted,

GEORGE R. ELDER,

Counsel for Plaintiffs in Error.

APPENDIX.

I.

State of Colorado, County of Lake, ss.

IN THE DISTRICT COURT WITHIN AND FOR SAID COUNTY AND STATE.

Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, successor in interest to Samuel McMillen, deceased, *Plaintiffs*,

vs.

Tingley S. Wood, Mary L. Bullard, Anna L. Finerty and Cecilia L. Wahrer, nee Cecilia L. Finerty, *Defendants*.

DECREE.

No. 5023.

This cause having been regularly called for trial by the court, Peter L. Palmer, presiding, and tried by the court December 1 and 2, 1902, the plaintiffs appearing by their counsel, John A. Ewing and George R. Elder, Esq., and the defendants appearing by their counsel, Charles Cavender and Thomas A. Dickson, Esqs., a jury being waived by both plaintiffs and defendants, the court having heard the evidence adduced on behalf of plaintiffs and defendants, and the arguments of counsel, and being fully advised in the premises, doth find the issues in said cause for the plaintiffs against said defendants.

It is therefore ordered, adjudged and decreed that the plaintiffs have judgment as prayed for in their

complaint, and replications herein against the defendants, and each and all of them.

Thereupon it is considered, ordered, adjudged and decreed by the court that the said plaintiffs, Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, successor in interest to Samuel McMillen, deceased, do have and recover of and from the said defendant, Tingley S. Wood, an undivided one-third interest of the Comstock lode mining claim, United States Survey No. 3613, situated on Breece Hill, California Mining District, county of Lake, state of Colorado, the premises in controversy herein, as described in the complaint and replications of plaintiffs, and have and recover of and from the said defendant, Tingley S. Wood, their costs in this behalf laid out and expended, to be taxed and have judgment therefor, and let execution issue therefor.

Wherefore, it is considered ordered, adjudged and decreed by the court that the said plaintiffs, Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, successor in interest to Samuel McMillen, deceased, do have and recover of and from the said defendant, Tingley S. Wood, an undivided one-third interest in and to the following described part and portion of the said Comstock lode mining claim, United States Survey No. 3613, situated in the California Mining District, county of Lake and state of Colorado, to wit: Beginning at intersection of line 4-1, Sur. No. 3613, Comstock lode, at S. 12° 18′ E. 172.12

ft. from Cor. No. 1, Comstock lode, and line 1-2, Sur. No. 667, Idaho lode, at S. 79° 38′ E. 21.2 ft. from Cor. No. 2, Idaho lode; thence S. 79° 38′ E. 186.4 ft. to intersection with line 1-2, Comstock lode; thence S. 47° 21′ E. 490.6 ft. to intersection with line 3-4, Idaho lode; thence N. 79° 38′ W. 491.3 ft. to intersection with line 4-1, Comstock lode; thence N. 12° 18′ W. 281.8 ft. to place of beginning, containing 2.05 acres, excluding from the above described tract 0.23 acres in conflict with Sur. No. 718, Pennsylvania lode, leaving a net area of 1.82 acres, included in the supplemental application for patent for the Comstock lode as applied for June 19, 1897, in the United States land office, at Leadville, Colorado, being part of the premises in controversy herein, as described in plaintiffs' complaint.

And it is ordered, adjudged and decreed as follows, viz.:

That whereas, the defendant, Tingley S. Wood, claims to own an undivided one-third interest in and to the Comstock lode mining claim, United States Survey No. 3613, Mineral Entry No. 2411, in the California mining district, Lake county, Colorado, containing nine and seventy-eight hundredths (9.78) acres of ground, under and by virtue of the treasurer's deed made, executed and delivered by M. F. Eagan, treasurer of Lake county, upon the 8th day of August A. D., 1892, to one C. T. Carnahan, recorded in book 152, page 6, of the records of Lake county, Colorado, upon the 11th day of August A. D. 1892, and by mesne conveyance from said C. T. Carnahan to defendant, Tingley S. Wood, by deed dated October 31st, 1893, recorded in book 158, page 174, of the rec-

ords of Lake county, Colorado, upon the 29th day of May, A. D. 1895, and that the said claim of title so made by Tingley S. Wood, the defendant aforesaid, constitutes and is a cloud upon the title of the said plaintiffs, Alice J. McCombe and Rowena E. McMcCombe by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, to the said undivided one-third interest in and to the said Comstock lode mining claim, United States Survey No. 3613, Mineral Entry No. 2411, as set forth and described in the complaint and replications of the plaintiffs herein.

And it is further ordered, adjudged and decreed that the said title to the undivided one-third interest and part of the Comstock lode mining claim, United States Survey No. 3613, so claimed by the said Tingley S. Wood, is of no force, virtue, effect and value, and that the said treasurer's deed, from M. F. Eagan, treasurer of Lake county, to Charles T. Carnahan, dated August 8, 1892, which is recorded in the office of the clerk and recorder of Lake county, Colorado, on August 11, 1892, in book 152, page 6, is of no force, effect or virtue, and is void in so far as the same affects the plaintiffs herein, and their title to the said undivided one-third interest in and to the Comstock lode mining claim, United States Survey No. 3613.

And it is further ordered, adjudged and decreed that the said mesne conveyance and deed from C. T. Carnahan to the defendant, Tingley S. Wood, dated October 31, 1893, as far as the same attempts to convey the said undivided one-third interest of the said Comstock lode mining claim, United States Survey No. 3613, which deed is recorded in the office of the

clerk and recorder of Lake county, Colorado, on the 29th day of May, A. D. 1895, in book 158, page 174, is of no force, effect or virtue, and is void in so far as the same affects the plaintiffs herein, Alice J. McCombe and Rowena E. McCombe by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased, and George R. Elder, and their title to the said undivided one-third interest in and to the Comstock lode mining claim, United States Survey No. 3613, situate in California Mining District, county of Lake and state of Colorado.

And it is therefore hereby ordered, adjudged and decreed that all adverse claims of the defendant, Tingley S. Wood, and all persons claiming or to claim said undivided one-third interest of said Comstock lode mining claim, United States Survey No. 3613, or any part of said interest, through or under said defendant, Tingley S. Wood, are hereby adjudged and decreed to be invalid and groundless, and that the plaintiffs, Alice J. McCombe and Rowena E. McCombe, by Alice J. McCombe, her next friend of her own selection, heirs at law of John McCombe, deceased are and are hereby declared and adjudged to be the true and lawful owners of an undivided one-sixth interest in and to the said Comstock lode mining claim, United States Survey No. 3613, and every part thereof; and that the plaintiff George R. Elder is, and is hereby declared and adjudged to be, the true and lawful owner of an undivided one-sixth interest in and to the said Comstock lode mining claim, United States Survey No. 3613, and every part thereof, as described

in the complaint and replications herein, and that their title thereto is decreed and adjudged to be quieted against all claims, demands or pretensions of the defendant, Tingley S. Wood, who is hereby perpetually estopped from setting up any claims thereto or any part thereof.

And it is further ordered, adjudged and decreed, that the said plaintiffs do have and recover their costs and charges in this suit, to be taxed against the said defendant, Tingley S. Wood.

Done in open court this 3d day of December, A. D. 1902.

(Signed) P. L. PALMER,
Judge.

To which judgment, findings and decree of the court and every part thereof, the defendant, Tingley S. Wood, excepts.

Thereupon, defendant Wood prays an appeal to the Supreme Court of the State of Colorado, which is granted upon condition that within five months from the 3d day of December, 1902, defendant Wood files a good and sufficient bond in the sum of $1,000.00, to be approved by the clerk of this court; and time and seven months from December 3d, 1902, is allowed defendant in which to tender his bill of exceptions herein.

It is further ordered that the above decree being entered on this 2d day of March, 1903, be entered of record herein *nunc pro tunc* as of the 3d day of December, 1902.

II.

Mr. Elder—On behalf of the plaintiff, George R. Elder, we object to the introduction of the tax deed of August 8, A. D. 1892.

First—Because it appears upon its face that it contains an area of 9.67 acres, and a part of this area, 1.80 acres, was cancelled by letter of the honorable commissioner of the land office, dated May 2, 1887, which cancellation still remains in force and effect to this date, December 1, 1902, and under the laws of this state that portion of 1.80 acres was not taxable for the year 1888, nor could it be sold in the year 1889, and the deed is therefore void and can pass no title against these plaintiffs.

Second—That, including as it does ground for which no receiver's receipt is issued, the assessment and taxation thereof was void, and the sale was void because illegal taxes were blended in the consideration expressed of $1.38.

Third—That the subsequent cancellation of the whole claim by letter of the commissioner, dated December 12, 1894, cancelled the entire entry made December 31, 1884, and the property was not subject to taxation from May 2, 1887, to and until December 12, 1894, and neither the assessor nor the county treasurer of Lake county had the power to assess the same.

Fourth—The assessment and the sale of the Comstock lode was void and without jurisdiction in the officers, as the title to the land remained in the United States and was not taxable by the state of Colorado or the county of Lake, and the equitable title was not full vested in plantiffs' grantors, and there remained something to be done to establish the right of plaintiffs' grantors.

Fifth—Said property was not taxable during the period of cancellation.

Sixth—An ejectment suit is now pending against the Comstock lode by the Collins lode for 1.82 acres

of the total area claimed in the 9.65 acres of this deed, in the District Court of Lake county, and the title for taxable purposes has not yet passed to plaintiffs or their grantors.

Seventh—The entire tax sale for the year 1889, for delinquent taxes for the year 1888, has been declared void and invalid for the reason that the notice of tax sale was published exclusively in the Sunday edition of the Herald Democrat, and this adjudication was made by the Supreme Court of Colorado in the case of Schwed vs. Hartwitz, 23 Colo., 187, and this deed based on such void notice is absolutely void, as no such sale took place.

III.

MINES.

An act providing for the taxation of mines and mining property in Colorado.

Sessions Laws, Colorado, 1887, pages 340, 341, 342, approved April 4, 1887.

Section 1. Mining Property to Be Assessed and Taxed.—All mines and mining property of the class heretofore exempted by the Constitution of the state of Colorado, shall hereafter be assessed and taxed, and the taxes levied, enforced by sale of the property taxed, in default of payment, in the same manner as is now or may be provided by law, in case of other classes of taxable real estate.

Section 2. Description of Property.—The number of the survey lot or the name of the lode or claim and the name of the mining district, shall be sufficient description for purposes of taxation and assessment of mining property.

Section 3. Mining Property—How Assessed.—All mines and mining claims and possessory rights therein, producing mineral during the year, exceeding in value the sum of one thousand dollars ($1000) shall be assessed by the assessor for the purposes of taxation and revenue as follows, viz.: The assessor shall compute and ascertain the gross proceeds in dollars and cents derived from the mine and mining claim, to be valued during the preceding fiscal year; such mine or mining claim shall be valued for revenue purposes at a sum not exceeding one-fifth of the sum thus ascertained, and said mine or mining claim shall be assessed and taxed accordingly; and if such gross proceeds are derived from a group of several mines or mining claimes contiguous to each other, owned or held by the same person, company or corporation, then such ascertained sum shall be equally divided among and prorated to each of such claims, and they shall be valued and taxed accordingly.

Section 4. Non-patented Property.—In case the mine or mining claim shall not be patented, or entered for a patent, but shall be assessable and taxable under this act, on account of producing gross proceeds, then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado.

Section 5. County Clerk Obtain List.—It shall be the duty of the county clerk of each county to obtain a list of all mineral survey lots, patented or entered for patent, or the name and locality of all productive possessory claims in his county, on or before the first day of May

in each year. He shall be allowed by the county commissioners his outlays necessarily expended in obtaining the same. Such list shall be used by the assessor to aid in listing any claims not already listed by the owners.

IV.

Second paragraph of section 4, act of congress, approved March 3, 1875, to enable the people of Colorado to form a Constitution, etc.:

> "Secondly—That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without said state shall never be taxed higher than the lands belonging to residents thereof, and that no taxes shall be imposed by the state on lands or property therein belonging to or which may hereafter be purchased by the United States."

V.

ORDINANCE.

In conformity with the requirements of an act of the congress of the United States, entitled "An act to enable the people of Colorado to form a Constitution and state government, and for the admission of said state into the Union on an equal footing with the original states," approved March 3, A. D. 1875, on

behalf and by the authority of the people of the territory of Colorado, this convention assembled in pursuance of said enabling act, at the city of Denver, the capital of said territory, on the twentieth day of December, A. D. 1875, does ordain and declare:

First: That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship.

Secondly: That the people inhabiting the territory of Colorado, by their representatives in said convention assembled, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposal of the United States; that the lands belonging to citizens of the United States residing without said state shall never be taxed higher than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein belonging to, or which may hereafter be purchased by the United States.

Third: That this ordinance shall be irrevocable without the consent of the United States and the people of the state of Colorado.

VI.

Section 3904, M. A. S., page 2064, Laws 1885, page 322, section 1:

> "No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary, notwithstanding."

VII.

Section 3883, M. A. S., page 2054, G. L. 1877, page 764, G. S. 1883, page 851, section 2913.

The treasurer shall give notice of the sale of real property by the publication thereof once a week for not less than four weeks in a newspaper in his county, if there be one, and additionally in all counties of the first-class in a German newspaper, if there be one, the first of which publications shall be at least four weeks before the day of sale; and by a written or printed notice posted in a conspicious place on or near the outer door of the office or building commonly used as the office of the treasurer, for not less than four weeks before the sale; and if there be no newspaper published in the county, the like notice shall be given by posting one written notice the above length of time in each election precinct in which any land to be sold is situate, and one on or near the door of the treasurer's office, as above provided.

VIII.

Section 3775, M. A. S., being section 2823, Sts. 1883.

Lands entered by pre-emption, final homestead, at public or private sale or otherwise, shall be subject to taxation, whether the patent for the same shall have been issued or not; and when such entry shall be made before the first of May in any year, the land so entered shall be subject to taxation for that year.

Section 3782, M. A. S., G. S. 1883, 2830.

Definitions of real estate.

First. The term "real estate" includes:

First. All lands within the state to which title, or the right to title has been acquired from the government of the United States.

Second. All mines, minerals and quarries in and under the land and all rights and privileges appertaining thereto.

Third. Improvements.

In the Supreme Court of the United [illegible]

October Term, 1907.

No. 95.

GEORGE R. ELDER, Successor in Interest to [illegible] McMillen, Deceased, ALICE J. McCOMBE, Administratrix of John McCombe, Deceased, and ROWENA E. McC[illegible] by Alice J. McCombe, Her Next Friend, Plaintiffs in [illegible]

vs.

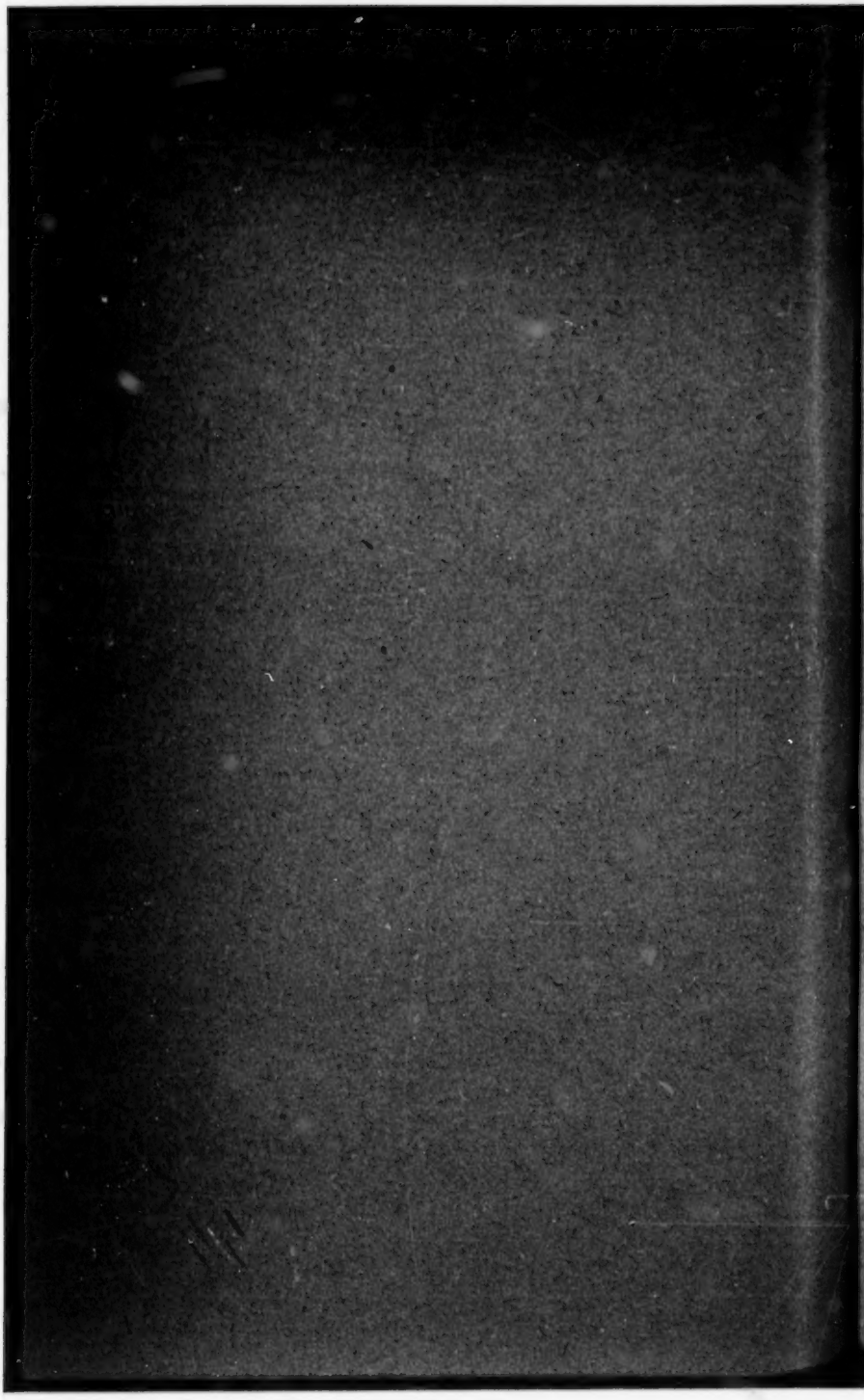
TINGLEY S. WOOD, Impleaded with MARY M. BULLA[illegible] ANNA L. FINNERTY and CECELIA L. WA[illegible] Defendants in Error.

In Error to the Supreme Court of the State of Colorado.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

GEORGE R. ELDER,
Counsel.

[illegible] Printing Co., Denver.



In the Supreme Court of the United States.

October Term, 1907.

No. 95.

GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased, ALICE J. McCOMBE, Administratrix of John McCombe, Deceased, and ROWENA E. McCOMBE, by Alice J. McCombe, Her Next Friend, Plaintiffs in Error,

vs.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY and CECELIA L. WAHRER, Defendants in Error.

In Error to the Supreme Court of the State of Colorado.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The brief of defendants in error asserts the proposition that plaintiffs in error never put forth their claim that their property had been confiscated by the taxing officers of the state of Colorado without "due process of law," and "under the law of the land," in contravention of plaintiffs in error and their grantor's rights, title, privileges and immunities under section 25, of article 2, of the Constitution of Colo-

rado, which reads "that no person shall be deprived of life, liberty or property without 'due process of law,'" and the correspondent sections in the amendments to the Constitution of the United States, section one (1), article five (5), being the fifth amendment to the Constitution of the United States, which reads, "Nor be deprived of life, liberty or property without 'due process of law.'" And section one (1), article fourteen (14), being the fourteenth (14th) amendment to the Constitution of the United States, which reads, "Nor shall any state deprive any person of life, liberty or property without due process of law," until it appeared in the assignments of error in the Supreme Court of the United States.

This assertion is absolutely and unqualifiedly without foundation in fact.

It is almost a universal proposition, upon the consideration of tax deed titles, both in the *nisi prius* courts and the appellate courts, to consider fundamentally, first, last and all the time, whether the divestiture of title by tax sale has been made in full compliance with the law, and has been made by "due process of law, and by the law of the land."

The replication of plaintiffs in error in the trial court, filed July 21, 1902, specifically and at large, raised this precise question. (See Allegations 10th and 11th, pages 14, 15 and 16, Transcript.) We quote from Allegation 11th:

> "And plaintiff expressly alleges that the assessment of said premises and the tax sale thereof was beyond and outside of the power and jurisdiction of the taxing officers,

and by reason of the fact that the title to said premises remained and continued in the United States from the 2nd day of May, 1887, up to and until December 21, 1896, and still remains at this date, to a large portion thereof, and was and is, therefore, not subject to taxation by the state of Colorado, and by reason of the void and invalid advertisement of said premises for tax sale in a Sunday newspaper, which would divest the owner of his property WITHOUT DUE PROCESS OF LAW."

Due "process of law," *ex vi termini*, is applied exclusively to the section 1, of article 5, of the 5th amendment, of the Constitution of the United States, the 1st section of article 14 of the 14th amendment of the Constitution of the United States, and section 25, of article 2, of the Constitution of the state of Colorado.

As used by plaintiffs in error in their replication it refers directly and specifically to the only provisions of the Constitution of the state of Colorado and of the United States, which mention and provide for any immunities, rights and privileges under the term "due process of law." It would be idle to draw any other inference from the use of the term in this replication. There are no statutes of the state of Colorado or of the United States which contain the words "due process of law," and there is no method of judicial construction by which a more comprehensive and satisfactory conclusion can be reached than to conclude that the use of these words means exclusively a reference to these constitutional clauses.

It is fundamental hornbook law that the term "due process of law" is applied exclusively to the fifth and fourteenth amendments of the Constitution of the United States, and these clauses are the first to be defined and discussed in Bouvier's Law Dictionary, under the caption of "Due Process of Law."

No other deduction can be reached from the broad discussion of this term by Justice White in Hovey vs. Elliott, 167 U. S., 409, and by Justice Miller in Davidson vs. Board of Admrs. of New Orleans, 96 U. S., 97.

The argument of the plaintiffs in error before Judge Palmer, in the original trial of this case, was based and founded upon this one fact, that the advertisement on Sunday did not constitute notice and "due process of law" under these constitutional pledges and guarantees.

Again, in plaintiffs' in error original brief, as appellees, in the Supreme Court of Colorado, this question was exhaustively discussed, as well as in the oral argument before the Supreme Court of Colorado. We have filed with this honorable court a dozen copies of this original brief, and upon pages 14 to 22, inclusive, will be found a full discussion of plaintiffs' in error claim, under the "due process of law" clauses of the state Constitution and the national amendments to the Constitution.

All this appeared again in the petition for transfer to the Supreme Court of Colorado *en banc,* as well as in the petition for rehearing. We therefore contend that this federal question has never been absent from this case since the filing of the replication of plaintiffs, July 21, 1902.

Under the authority of the case of Bellingham Bay & British Columbia R. R. Company vs. City of Whatcom, 172 U. S., 314, we claim this court has jurisdiction to hear this case. Justice Brewer announces the rule, as follows:

> "By its answer the defendant raised a federal question, inasmuch as it alleged that the notice of the reassessment was insufficient, and specifically that by reason thereof its property was sought to be taken without due process of law, and in conflict with the terms of the fourteenth amendment to the Constitution. This court, therefore, has jurisdiction of the case."

It is categorically stated in the tenth allegation of plaintiff's replication, page 16, transcript:

> "That by reason of said advertisement in a Sunday newspaper only, and published and issued upon Sunday only, such notice was not a legal notice, and that all proceedings thereunder were without force and effect and that the sale thereon was invalid and void."

It is a noteworthy fact that the opinion of the Supreme Court of Colorado in this case does not mention the words "Due Process of Law," nor connect it with the constitutional immunity claimed and so forcibly and insistently urged by counsel for appellee below. Indeed, not once in this case, in his abstract of record and brief in the court below, nor in his brief in this court, does counsel for defendants in

error mention the phrase "Due Process of Law," or the constitutional privileges or immunities claimed by plaintiffs in error.

The Supreme Court of Colorado failed to consider in a single line or syllable of its opinion the proposition that a notice of tax sale published exclusively on Sunday was not a legal notice of sale; was not the orderly compliance with the statute, or that a sale under such notice was absolutely void and vested no title in the purchaser, and that no such sale took place, and that the publication of such notice was a fundamental step in the process of law to deprive the citizen of his property for failure to pay taxes, and that without this step jurisdiction was lacking in the officers to create such forfeiture.

The failure of the justices sitting in the court below to even mention in their opinion the question whether the tax deed was based upon such jurisdictional steps as constituted "due process of law," and was made by, through and under the "law of the land," establishes the fact that no proper consideration was given by the court to the real merits of the controversy.

Again, the contention raised by defendants in error, that the question of the title to the Comstock lode, being and remaining in the United States, unentered and unpatented, and therefore being untaxable, was not raised until made in the assignments of error, is not tenable.

This question was explicitly raised in the tenth, eleventh, twelfth and thirteenth allegations of the replication of plaintiffs in error, pages 14, 15, 16 and 17, transcript, it was thoroughly argued before

Judge Palmer in the District Court below. It was announced and relied upon in six of the objections to the tax deed of defendants in error. (See page 36, Transcript of Record.) It appears also in plaintiffs' motion for judgment, page 41, transcript. It was fully argued in the printed brief of plaintiffs as appellees in the court below—see pages 23 to 39 and 47 to 56—and the enabling act of congress for the admission of Colorado was printed in plaintiffs' brief in full at page 37.

The question was argued orally at length before the Supreme Court of Colorado, and appears, also, in the petition of appellees for rehearing, and petition for transfer to Supreme Court en banc.

The fact that the Supreme Court of Colorado, in its opinion, squarely held that unpatented, unentered mining claims, still held by the land department, at its sole disposal, were subject to assessment for taxes and sale for flat acreage tax, as was the case of the Comstock lode, absolutely proves that this contention of defendants in error is false.

Throughout this entire case both the Supreme Court of Colorado and counsel for defendants in error have evaded the patent fact that the errors present in the tax deed were "vital and jurisdictional," both in matter of form and in lack of power. They have also intentionally blinded their eyes to the fact that there is no case in the books where unpatented, unentered mining claims have been sold for taxes and the title has passed prior to entry and issuance of patent. All the cases cited by them contain only cases where the patent from the United States government had actually passed to the patentee before any levy of taxes was made and before sale.

This is true of the cases cited upon page 16 of defendants in error's brief.

The case of DeForesta vs. Gast, 20 Colo., 307, did not pass upon the five-year statute of limitations, section 3904, Mills, but did pass upon section 2924, Mills, and upon the force and effect of color of title in a tax deed under section 2924, and was also complicated by the question of the non-tender of taxes to procure the decree. It is, therefore, not a case in point under section 3904, Mills.

Bennett vs. N. C. S. L. & I. Co., 23 Colo., 470, is no less inapplicable under the same considerations as contained in the DeForesta case.

In the case of Williams vs. Conroy, 35 Colo., 117, the court inextricably mixed the two statute sections 2924 and 3904, when, as a matter of fact, there was no proof under section 2924, and there could be no color of title, since a tax sale and deed intervened and five years' payment of taxes was not made.

All of these cases being based upon property upon which patents had been issued by the United States, do not furnish a precedent for the case at bar.

This honorable court will note that no part of the opinion of the Supreme Court of Colorado, or of the brief of defendants in error, touches upon or even discusses in the slightest manner the claim of plaintiffs in error.

> "That the plea in bar of the five-year limitation statute, section 3904, Mills' Annotated Statutes, was not available to defendants in error, since until patent issued to the entryman for the land from the United States the statute could not be pleaded."

This is the unqualified rule in the United States Supreme Court under the following decisions:

Gibson vs. Choteau, 13 Wall., 92; J. Field, Dec. 5, 1872.

Henshall vs. Bissell, 18 Wall., 255; J. Field, Jan. 5, 1874.

Redfield vs. Parks, 132 U. S., 239; J. Miller, Nov. 18, 1889.

Northern Pac. R. Co. vs. Slaght, 205 U. S., 122; J. McKenna, April 15, 1907.

So, also,

Circuit and District Courts of U. S.

Pitts vs. Clay, 27 Fed., 635.

Bunson vs. Keokuk, 3 Dill., 490.

Coulter vs. Stafford, 56 Fed., 564.

The rule is uniform in the Western states that "limitations do not run against one entitled to the legal title to government land until the patent by which it is granted is issued to him."

California:

Doru vs. Baker, 96 Cal., 206.

Manley vs. Howlett, 55 Cal., 94.

Gardiner vs. Miller, 47 Cal., 570.

Hagar vs. Speck, 48 Cal., 408.

Colorado:

Denver & Rio Grande R. R. Co. vs. Wilson, 28 Colo., 14, Oct. 15, 1900.

Nevada:

South End Min. Co. vs. Tinney, 22 Nev., 228, Dec. 10, 1894.

Utah:

Steele vs. Boley, 7 Utah, 66, Aug. 30, 1890.

Washington:

Slaght vs. North. Pac. R. R. Co., 39 Wash., 576, Aug. 14, 1905.

Montana:

King vs. Thomas, 6 Mont., 410, Jan. 7, 1887. Carothers

Mayer vs. ~~Carothers~~, 14 Mont., 274, Dec. 26, 1894.

There is but one qualification or exception upon the universal application of this rule, and that is where the grant is *in praesenti.*

In Iowa R. R. Land Co. vs. Blumer, 206 U. S., 482, Feb. 27, 1907, Justice Day says, page 493:

> "But when the grant is *in praesenti,* and nothing remains to be done for the administration of the grant in the land department, and the conditions of the grant have been complied with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the lands, and title by prescription would run against it in favor of one in adverse possession under color of title."

Deseret Salt Co. vs. Tarpey, 142 U. S., 241; J. Field, Dec. 21, 1891.

Toltec Ranche Co. vs. Cook, 191 U. S., 532; J. McKenna, Dec. 21, 1903.
Sharon vs. Tucker, 144 U. S., 533.
Leffingwell vs. Warren, 2 Black, 599.
Campbell vs. Holt, 115 U. S., 620.

Under the limited conditions and restrictions surrounding the grants under the mining acts of congress, it has never been held that the possessory title held by a mining location is an absolute, completed grant *in praesenti.*

In King vs. Thomas, 6 Mont., 415, the Supreme Court of Montana gives the real reason why a mining location could not be held to be a grant *in praesenti.*

> "The law imposes on the miner certain duties and obligations necessary to be performed before a patent can issue, and certain delays are indispensable in the performance of these preliminary requisites, and after all has been done that can be done by the mining claimant the consummation of the title rests entirely with the government. For these very sufficient reasons the statute of limitations does not begin to run against him from the date of his location, but only after the patent has issued, and the government has finally disposed of the soil and the miner has become the absolute owner thereof."

Upon pages 3 and 4 of the brief of counsel is an attempted discussion of the fourth assignment of error, which was:

"That the Supreme Court of Colorado erred in holding and assuming to hold that unpatented, unentered mining locations, held under the mining statutes of the United States, the title to which still remains in the United States, can be taxed, and are taxable, for other purposes than net output tax under the laws of Colorado, and especially under the act of April 4, 1887, Mills' Ann. Stats., sections 3224-3226, and in holding that the unentered, unpatented area of the Comstock lode, the property of plaintiffs in error, was taxable under said act, and that this holding and construction of the act of April 4, 1887, was in violation of, and in direct contravention of, the 2d paragraph of the fourth (4th) section of the enabling act of congress, approved March 3, 1875, for the admission of the state of Colorado."

Counsel for defendants in error in his brief refuses to make the positive claim that the Comstock lode was assessed in the year 1888, "on account of producing gross proceeds," because the policy of the defendants in error is, and has been throughout this argument, to conceal from this court that the Comstock lode was actually assessed in the year 1888, at a flat acreage valuation, and assessment of ten dollars per acre, being a total valuation of $100.

We desire to direct this honorable court's attention to the fact that plaintiff's Exhibit "J" (see Transcript, pages 46-47), shows just how this Comstock lode was assessed for the year 1888. The abstract of the assessment roll for the year 1888 shows

the name of the Comstock lode Survey No. 3613, acres 9.67, and in the schedule under the caption, "Value of Lands and Improvements," in the ninth column of said schedule, the value in dollars as one hundred. This, in terms, means a flat acreage tax of ten dollars per acre, there being 9.67 acres and no improvements upon the ground at all.

In column sixteen of the same abstract, under the caption, "One-fourth Proceeds Dollars," there is no entry of any kind. This establishes the contention of plaintiffs in error that the assessment of the Comstock lode made by the assessor was upon a flat acreage tax instead of a net proceeds or net output tax.

The opinion of the Supreme Court of Colorado (see pages 60, 61 and 62) assert the unwarranted proposition that the possession of a mining claim could be assessed and sold for taxes, when unentered and unpatented for other purposes than "on account of producing gross proceeds," under section 4, of the act of April 4, 1887.

We desire to call this court's attention to the exact wording of section 4 of that act (see page 120 of plaintiffs in error's brief, appendix III):

> "Sec. 4. Non-Patented Property. In case the mine or mining claim shall not be patented, or entered for a patent, *but shall be assessable and taxable under this act, on account of producing gross proceeds*, THEN, AND IN THAT CASE, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the

> sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado."

The very words of this section, so erroneously construed by the Supreme Court of Colorado, limit the power and authority of the assessor to assess non-patented, unentered mining claims, and their possessory rights, to the one single, easily determinable case, "but shall be assessable and taxable under this act, on account of producing gross proceeds," and in express words of limitation distinctly confines the power of the assessment and sale of the possession in the following words: "And in that case, the possession shall be the subject of the assessment."

It must be remembered that by section 3, article X, of the Constitution of Colorado, mines and mining claims bearing gold, silver and other precious metals were exempt from taxation for ten years after the adoption of the Constitution, March 14, 1876. We print in this reply brief, as appendix IX, this section in full. And this very exemption makes the exception in so many plain words, "except the net proceeds." So that at all times mines and mining claims in Colorado were assessable for net proceeds.

The first six objections to the tax deed of defendants in error, made by plaintiffs in the trial of this case before Judge Palmer, covered this entire proposition of the untaxable nature of the Comstock lode under the statutes of the state of Colorado, for and during the year 1888. (See page 36, Transcript of Record.) Judge Palmer sustained every one of these objections in granting his final decree and finding for plaintiffs in error.

We quote objections third and fourth:

> "Third. That the subsequent cancellation of the whole claim by letter of the commissioner dated December 12, 1894, cancelled the entire entry made December 31, 1884, and the property was not subject to taxation from May 2, 1887, to and until December 12, 1894, and neither the assessor nor the county treasurer of Lake county had the power to assess the same.
>
> "Fourth. The assessment and sale of the Comstock lode was void and without jurisdiction in the officers, as the title to the land remained in the United States, and was not taxable by the state of Colorado or the county of Lake, and the equitable title was not fully vested in the plaintiffs' grantors, and there remained something to be done to establish the right of plaintiffs' grantors."

The refusal of the land department of the government to dispose of the area of the Comstock lode to plaintiffs' grantors from the 31st day of December, 1884, the date of the original entry, its partial and total cancellations of the dates May 2, 1887, and August 7, 1894, and its partial reinstatement upon the 21st day of December, 1896, and its present determination to await the result of the present adverse suit and the adverse suit of the Collins lode vs. the Comstock lode, No. 5025 of the record of the District Court of Lake county, filed September 17, 1897, still undetermined, is proof positive of plaintiffs in error's entire contentions, and that no taxable title ever passed to plaintiffs in error by these proceedings, and

that the government through its land department still held full control of the land and by its various rulings established the fact that the right to patent in the location claimants was incomplete, and that it still retains the entire title at its own disposition, to be finally parted with after the several contests before the land officers and the courts are at last decided.

We, therefore, challenged the construction placed by Justice Maxwell in his opinion of section 4 of the act of April 4, 1887, Mills' Ann. Stats., 3224-3226 (see Transcript, folios 186-188, pages 61-62), as in violation and contravention of the enabling act of congress of March 3, 1875, and assert that the act, as so construed, does not warrant his conclusion as applied to this case, that bare unproductive mining locations held by possessory title alone which have not been patented or entered for patent, are subject to taxation.

In this erroneous construction the Supreme Court of Colorado disagrees with the rules of law as announced by the Supreme Court of the United States and many of the states of the United States.

The rule is universal that:

> "While the title remains in the government, public lands are not subject to state taxation, and tax sales and tax deeds thereof are void, and one subsequently acquiring title thereto can contest their validity."

In Hussman vs. Durham, 165 U. S., 147, Justice Brewer clearly draws the lines of construction in the following language:

"Yet, until such equitable title has passed and while the land is still subject to the control of the government, it is beyond the reach of the state's power to tax."

This opinion of the honorable justice is amply supported by the following line of decisions:

Hussman vs. Durham, 88 Iowa, 29.
K. P. R. R. Co. vs. Prescott, 16 Wall., 603.
Railway Co. vs. McShane, 22 Wall., 144.
North. Pac. R. R. Co. vs. Rockne, 115 U. S., 600.
Central Colo. Imp. Co. vs. Pueblo Co. Commissioners, 95 U. S., 259.
Cooley Tax'n (3d Ed.), 1903, page 136.
Pitts vs. Clay, 27 Fed. Rep., 635.
Coulter vs. Stafford, 56 Fed. Rep., 564.
Bronson vs. Keokuk, 3 Dill., 490.
Campbell vs. Spears, 120 Iowa, 670.
Duncan vs. Newcomer, 9 S. D., 375.
Scott vs. Chicasaw Co., 46 Iowa, 253.
Reynolds vs. Plymouth Co., 55 Iowa, 90.
Moriarity vs. Boone Co., 39 Iowa, 634.
Kohn vs. Barr, 52 Kan., 269.
Calder vs. Keegan, 30 Wis., 126.
Davis vs. Magoun, 109 Iowa, 308.

Under this state of facts and the law applicable to them, the entire claim of the Comstock lode was not subject to the taxing powers of the county of Lake and the state of Colorado, and that all efforts of those

officers to subject the same to the process for assessment and sale for taxes was absolutely void and of no effect, and that the particular tax deed and tax sale made August 5, 1889, by the county treasurer of Lake county was no sale, and that the decree of the court removing the cloud upon the plaintiffs' title created by such sale was correct in every particular.

Upon page 13 of his brief counsel attempts to belittle the contention of plaintiffs in error, that a notice of tax sale is a mandatory provision of the revenue acts of Colorado, and the requirement of the act, which we have set forth in full, appendix VII, page 123, original brief, when it has not been complied with, as in this case, is such a trifling irregularity, and of such small importance, that the statute of limitations, section 3904, Mills, was passed to cover just such small irregularities.

Counsel failed to discuss in a single line of his brief, just as the Supreme Court of Colorado failed in its opinion to discuss, the full and entire force of the case of Schwed vs. Hartwitz, 23 Colo., 189. In this case the District Court decided just as Judge Palmer did in the case at bar, that the publication of a tax sale notice in a Sunday edition only was not legal notice. In no case cited by defendants in error does it appear that no notice at all was given. In the cases of ~~Cusiman~~ Cusman vs. Johnson and ~~Cusiman~~ Cusman vs. Heinrich, 23 Colo., 264, cited by counsel, it is not claimed that no notice was given, but simply that the notice was incomplete in time. A statute of limitations may be stretched to cover the case of an incomplete notice, but we think not to cover the entire absence of notice, as was proved in this case.

No specious arguments, drawn from what the statute states to be the *prima facie* evidence of a tax deed, will support the deed offered by defendants in error in this case, when it is absolutely proven that no notice at all was given of the tax sale, held August 5, 1889, no intendments of curative statutes can support a sale made absolutely without published notice of any kind. Absence of notice is a vital jurisdictional defect, which can not be remedied. The silence of the Supreme Court of Colorado upon the case of Schwed vs. Hartwitz, 23 Colo., 189, is an affirmance of the principle therein established. It is thus admitted that, under the rule of *caveat emptor*, so strictly and rigidly applied to purchasers at tax sale, the defendant below and his grantor were bound and chargeable with full notice of the vital jurisdictional errors in this attempted tax sale of the Comstock lode; it was his duty to note the fact that the publication of tax sale was made only in a Sunday newspaper, which he or his grantor must have seen to be a bidder at the sale. They are put upon inquiry whether or not the land as advertised for tax sale in a Sunday newspaper only, was offered for sale according to law, and the courts of law are scrupulously careful that no man shall be deprived of his property through tax proceedings that are not in all respects in substantial compliance with the statutory requirements.

These are held to be vital, jurisdictional, mandatory requirements by all the authorities.

Black. Tax Titles, section 205:

> "But it is held in all states, we believe, that the giving of notice, in the form and

manner prescribed by the statute, is an essentially jurisdictional fact; that no circumstances will obviate the necessity of it; that the omission of notice is not a mere irregularity, but a vital defect; and that the validity of all the future proceedings depends upon a substantial (if not a literal) compliance with the law in this regard."

Blackwell, section 398:

"It may, however, be laid down as a general rule that the advertisement of the sale in the time and manner prescribed by the law is a prerequisite to the validity of a tax title. The officer derives his power of sale, in part, from the advertisement of it. Power is conferred upon him to be exercised on certain contingencies; and these contingencies must have happened and the condition on which he can act must have been performed, before his act can be valid. His power does not attach until every prerequisite of the law has been complied with."

Id., 398:

"Want of notice of sale avoids the title. It is not an 'error or defect going to the validity of the assessment and affecting the groundwork of the tax,' and so is not within the protection of the Wisconsin laws of 1880 (Ch. 309). The giving of notice in the manner prescribed by law is an essential jurisdictional fact."

Cooley Tax'n, 482-483:

"Unusual care is required in obeying the directions of the statute regarding notice, as no one who is entitled to notice can be bound by a sale which has been made without it." * * * Id.

"This is one of the most important of all the safeguards which has been deemed necessary to protect the interests of parties taxed, and nothing can be a substitute for it or excuse the failure to give it. The notice being a prerequisite to the officer's authority, the fact that in the particular case it can be shown that the party concerned was fully aware of the proceedings will be of no avail in supporting them. He is under no obligation to take notice of the proceedings unless duly notified. Mere informalities or unimportant variances in an attempt to comply with the law may not be fatal, but variance in substance can not be overlooked.

"A tax sale is void unless the notice of sale is duly published in accordance with the requirements of the statutes."

Hodgden vs. Burleigh, 4 Fed., 111.

Johnson vs. Harper, 107 Ala., 706.

Daniel vs. Taylor, 33 Fla., 636.

Morris vs. St. Louis Nat. Bank, 17 Colo., 231.

Langlois vs. Stewart, 156 Ill., 609.

Moore vs. Brown, 52 U. S., 414.

Hill vs. Nicholson, 92 N. C., 24.

Olsen vs. Bagley, 10 Utah, 492.
Marx vs. Hanthorn, 148 U. S., 172.
Thompson vs. McLaughlin, 66 Ill., 409.
Gage vs. Kaufman, 133 U. S., 471.

It has been uniformly held that statutory provisions for advertisement of a notice of tax sale are mandatory.

Gomer vs. Chaffee, 6 Colo., 314.
Langlois vs. Stewart, 156 Ill., 609.
Early vs. Doe, 16 How., 610.

In McCord vs. Sullivan, 85 Minn., 344, the court says:

> "G. S. 1894, section 1591, requiring notice of tax sale to be given by the county auditor as therein directed, is mandatory, and must be strictly complied with. A proper posting and publication of such notice is an indispensable prerequisite to the authority of the auditor to make the sale, without which he has no jurisdiction to proceed."

In the cases of ~~Cusiman~~ Cusiman vs. Johnson and ~~Cusiman~~ Cusiman vs. Heinrich the cases were primarily reversed for the reason that no tender of past paid taxes was made, and we have cited the case of ~~Cusiman~~ Cusiman vs. Johnson, 23 Colo., 264, page 55, original brief, and now restate the most valuable *obiter* propositions announced in it, because they are patent tax title law, and have

been overthrown by the Supreme Court of Colorado in the case at bar. We cite:

> "It will, of course, be admitted that there are some objections against tax titles that can not be obviated by statute, as the effect would be to deprive the owner of property without due process of law. Among illustrations of defects of this nature may be enumerated instances where the property sold was not within the jurisdiction of the tax district, or that the sale in fact never took place; but, as a general rule, all questions with reference to tax proceedings, except such as go to the power and jurisdiction of the taxing officers, or the fraud and misconduct of the parties, are barred by the statute."

Upon pages 14 and 15 of his brief, it has been impossible for counsel to remember that this case was originally a mining adverse suit; that it was based on an adverse plat filed in the United States Land Office, and that the first Exhibit A of plaintiffs in error in this case was a copy of that adverse plat; that this plat, together with the face of his tax deed, made a complete and necessary identification of the two facts appearing at large in the complaint and replication of plaintiffs; that part of this 9.67 acres of the Comstock lode mining claim was unentered land upon the first of May, A. D. 1888, when the attempted assessment was made, and that over 20 per cent. of the total area of 9.67 acres—described in the assessment list, the tax sale advertisement and the

tax deed as unentered public domain, no part of which was sold by the government of the United States, or patented to the entrymen—and that these facts absolutely settle the contention of plaintiffs in error that the face of the tax deed showed this patent invalidity.

In the decisions and opinions in the case of Williams vs. Conroy, 35 Colo., 117, and in the case at bar, the Supreme Court of Colorado has, without warrant and authority in law, attempted to apply to these cases the rule announced in the cases of De Foresta vs. Gast, 20 Colo., 307, and Bennet vs. N. C. S. L. & I. Co., 23 Colo., 470, when discussing an entirely different statute of limitations. The latter cases passed upon section 2189, General Statutes of 1883, page 675, being section 2924, Mills' Annotated Statutes. We have printed this section as appendix X to this reply brief. Under the terms of that statute, to claim its benefits the claimant, under color of title, must pay all taxes assessed for a period of five successive years, and the benefits of this section shall not accrue to the holder of the color of title if any person with another title shall pay taxes for any one or more years of the five years.

In the Williams vs. Conroy case it is plain that the holder of the patentee title, by the payment of the taxes for the year 1891 and by the record of the tax deed upon December 18, 1896, within the five years from June, 1893, barred the plaintiff Williams from the benefits of section 2924, Mills' Annotated Statutes. A mere statement of these facts will convince this court that the Supreme Court's opinion in Williams vs. Conroy was a complete miscarriage of the

law in its attempt to adjudicate the rights as between tax titles and patentee claimants.

In the case at bar, upon page 63 of the transcript, the Supreme Court of Colorado uses the identical language of the Williams vs. Conroy opinion. In neither of these cases can it be said that section 2924, Mills' Annotated Statutes, applies, certainly not to the case at bar, since it appears, by a reference to plaintiffs' Exhibit Y, pages 50 and 51 of the transcript, tax sale certificate of purchase, that no taxes were paid by defendant in error Wood upon this property from the year 1894 to the year 1898. Endorsed upon said certificate are the words: "This certificate is surrendered and $12.60 redemption money paid to A. V. Hunter & T. S. Wood, Feby. 9th, 1898."

This redemption was made over five months after this action was brought, September 17, 1897.

The recital of these facts, therefore, establishes our proposition that none of the authorities cited by the Supreme Court of Colorado and the counsel for defendants in error are applicable to the case at bar, since the principles therein contained apply entirely to a different statute of limitations. (Section 2924, Mills' Ann. Sts.) With the plain and apparent intermingling of different rules of construction under different statutes of limitations, the contention of plaintiffs in error is well founded that none of these cases apply to the case at bar.

In closing his brief counsel dwells upon what he is pleased to term the laches of plaintiffs in error in failing to pay the sum of $1.10 assessed against this one-third of the Comstock lode in 1888, and the $3.92 subsequent taxes paid by Charles T. Carnahan, nephew and agent of Tingley S. Wood, defendant in error,

professional tax sale philanthropists, whose munificent philanthropy, so counsel said in the court below, had developed the premises and made it a profitable and paying mine, extracting over $80,000 gross in the years 1901 and 1902.

We use the term "professional tax sale buyer" advisedly, because in the record of this case alone defendant Wood's Exhibit No. 2, folios 87 and 88, page 37, transcript, shows the conveyance to him of thirty-two separate pieces of mining property acquired by tax sale prior to its date, October 31, 1893.

This Suit was brought September 17, 1897. The total outlay of Messrs. Carnahan and Wood up to the date of suit was ten 84/100 dollars. This was the sum total of his vast expenditure; while plaintiffs in error waited upon Mr. Wood's daring and costly development of this mine of uncertain and rapidly changing values, and as every cent of this sum was paid into the county treasurer's hands, it failed to do much development of the surface ground of the Comstock lode.

In Hoskins vs. Illinois Cent. R. R. Co., 78 Miss., 768, Justice Terral of the Supreme Court of Mississippi differs widely from the views of counsel upon what "neglect and laches" really are in an identical case to the one at bar.

> "There is no neglect where there is no power in the authorities to assess the land for taxes, and this is true whether the land is exempt because it belongs to the federal government or to the state, or to the county, or to a municipality, or to a levee board, or is for any reason exempted from taxation. We

> see no reason in the nature or qualities of the exemption, by reason of the ownership of the land by the federal government or other owner. We place our decision upon the ground that the property is exempt from taxation by law, and all attempts to subject it to taxation is in fraud or in violation of law, is the act of wrong-doers and can not give color for divesting the title of the owner by three years' actual occupation under section 2735, Code, 1892."

Justice Palmer found in the court below, under the authority of Redfield vs. Parks, 132 U. S., 239, that the statute of limitations (section 3904, Mills' Ann. Sts.) could not be pleaded in bar of plaintiffs' in error's rights until they as entrymen had received a patent from the United States government, and he had full authority for that finding, by virtue of the decision of the Supreme Court of Colorado in the case of

Denver & Rio Grande R. R. Co. vs. Wilson, 28 Colo., 14.

> "The authorities are that, as between rival individual claimants of land acquired from the United States government, the statute of limitations does not begin to run in favor of an adverse claimant in possession as against an entryman until the latter, by a full compliance with the law, becomes entitled to a patent. This disposes of the plea of the bar of our statute, for the action was instituted within the period therein limited."

And in Gomer vs. Chaffee, 6 Colo., 317, where Justice Elbert says:

> "It is difficult to see how the statute of limitations can avail a defendant holding a *void* deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor the right of actual possession. The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of the law."

The trial court below found that the facts, the law and the equities were upon the side of plaintiffs in error, and the court so decreed. The Supreme Court of Colorado reversed this decree upon untenable grounds, as shown in our original brief and in our reply.

We therefore pray that the judgment of the Supreme Court of Colorado, reversing the decree entered for plaintiffs in error, be reversed, and that the judgment and decree of the District Court of Lake county, entered in favor of plaintiffs in error in this case, be affirmed and upheld as rendered.

Respectfully submitted,

GEORGE R. ELDER,
Counsel for Plaintiffs in Error.

APPENDIX.

IX.

Exemption of mines and mining claims, under section 3, article X, Constitution of Colorado:

> "Provided, That mines and mining claims bearing gold, silver and other precious metals (except the net proceeds and surface improvements thereof) shall be exempt from taxation for the period of *ten* years from the date of the adoption of this Constitution, and thereafter may be taxed as provided by law."

Constitution of Colorado was adopted March 14, 1876.

X.

Section 2924, Second Mills' Ann. Stats., Gen'l Stats. 1883, page 675, section 2187:

> "Section 2924. Vacant Lands—Payment of Taxes Five Years—Proviso].
>
> "Whenever a person having color of title, either by pre-emption or otherwise, as aforesaid, made in good faith to vacant and unoccupied land or mining claims, shall pay all taxes legally assessed thereon, or for improvements situate thereon, for five successive years, he or she shall be deemed and ad-

judged to be the legal owner of said vacant and unoccupied lands or mining claims, to the extent and according to the purport of his or her proper title or pre-emption. All persons holding under such taxpayer by purchase, devise or descent, before said five years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of the taxes for the term aforesaid, shall be entitled to the benefit of this section: Provided, however, That if any person having a better paper title or pre-emption to said vacant and unoccupied lands or mining claims, shall, during the said term of five years, pay the taxes assessed on said lands or mining claims, or improvements thereon, for any one or more years of the said term of five years, then, in that case, such taxpayer, his heirs and assigns, shall not be entitled to the benefit of this section."

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 95.

GEORGE R. ELDER ET AL., PLAINTIFFS IN ERROR,

vs.

TINGLEY S. WOOD, IMPLEADED WITH MARY M. BULLARD, ANNA L. FINERTY, AND CECILIA L. WAHRER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

MEMORANDUM OF AUTHORITIES SUBMITTED FOR DEFENDANTS IN ERROR.

I.

For the convenience of the court, we print the following from the cases cited on the brief for defendants in error (page 8):

In *Forbes v. Gracey* (94 U. S., 767) there was presented the direct question whether the possessory mining claim could be sold for State taxes, under State law, on default in payment thereof. This court ruled in the affirmative, saying (pp. 766, 767):

> "In regard to the taxing of this personal property, "and the mode of collecting it by sale, as provided in

"the section last cited, it does not seem to us that "there can be any reasonable ground for asserting "that the United States has any interest in the tax "or in the sale of the property taxed. It is, however, "urged with more show of reason that section 6, "which makes this tax 'a lien on the mines or min- "ing claims from which the ores or minerals bear- "ing gold or silver are extracted for reduction,' is "an interference with the right of the property of "the Government in the lands in which the mineral "remains are extracted.

"An examination of the language we have quoted "will show that it was carefully prepared to avoid "this objection, and we think it does.

"The use of the words 'mines or mining claims' "is evidently intended to distinguish between the "cases in which the miner is the owner of the soil, "and therefore has perfect title to the mine, and those "in which the miner does not have title to the soil, "but works the mine under what is well known in "the mining districts, and what is, as we have said, "recognized by the act of Congress, as a mining "claim. In the first case, the statute makes the tax "a lien on the mine, because the title to the mine is "in the person who owes and should pay the tax. "In the other, the tax is a lien only on the claim of "the miner; that is, on his possessory right to ex- "plore and work the mine under the existing laws "and regulations on the subject.

"In the former case, of course, the United States "has no interest to be protected, and the State is at "liberty to declare and enforce such a lien for her "taxes. In the latter, also, such right as the min- "ing laws allow and as Congress concedes to develop "and work the mines is property in the miner, and "property of great value. That it is so is shown "most clearly by the conduct of the mining corpora- "tion in whose interest this suit is brought, which, "for the purpose of evading this tax, permits its in- "vestment in this mine, said to be worth from fifty "to a hundred million of dollars, to rest on this claim, "this mere possessory right, when it could, at a "ridicuously small sum compared to the value of the

"mine, obtain the Government's title to the entire "land—soil, mineral, and all. Those claims are the "subject of bargain and sale, and constitute very "largely the wealth of the Pacific coast States. They "are property in the fullest sense of the word, and "their ownership, transfer, and use are governed by "a well-defined code or codes of law, and are recog-"nized by the States and the Federal Government. "This claim may be sold, transferred, mortgaged, and "inherited, without infringing the title of the United "States. Why may it not also be made subject to "a lien for taxes, and the claim, such as it is, recog-"nized by statute, be sold to enforce the lien? We "see nothing in principle or in any interest which "the United States has in the land to prevent it."

In *Manuel v. Wulff* (152 U. S., 505, 510), it was again said:

"It has, therefore, been repeatedly held that min-"ing claims are property in the fullest sense of the "word, and may be sold, transferred, mortgaged, and "inherited without infringing the title of the United "States, and that when a location is perfected it has "the effect of a grant by the United States of the "right of present and exclusive possession (*Forbes* "*v. Gracey,* 94 U. S., 762; *Belk v. Meagher,* 104 U.S., "279; *Gwillim v. Donnellan,* 115 U. S., 45; *Noyes* "*v. Mantle,* 127 U. S., 348)."

To these we add *Maish v. Arizona* (164 U. S., 599, 609), wherein the court held:

"It has been held that possessory rights founded "upon mere occupation and improvements upon "Government land, though invalid as against the "Government, may be made the subject of barter "and sale, and may be treated under the laws of the "State and Territory as having all the attributes of "property (*Lamb v. Davenport,* 18 Wall., 307; "*Bishop of Nesqually v. Gibbon,* 158 U. S., 155, "168.

"In *Central Pacific Railroad v. Nevada,* 162 U. S., "512, it was decided that the possessory claim of the

"railroad company to lands within the State of "Nevada was subject to taxation, notwithstanding the "fact that the lands might thereafter be determined "to be mineral lands, and so excluded from the opera- "tion of the railroad grant. (See also *Northern "Pacific Railroad Company v. Patterson*, 154 U. S., "130, 132.) Within the reasoning of these de- "cisions, as it does not appear that these lands were "not held by perfect grants under the laws of Mexico, "or that they were not in the possession of the appel- "lants, and covered with valuable improvements, it "must be held that the objection to their taxation "cannot be sustained."

II.

Upon the point that the decision of the Supreme Court of Colorado declaring the effect of the State statute of limitations is controlling, we cite, in addition to the cases appearing upon the brief for defendants in error (pp. 13, 14)—

Leffingwell v. Warren, 2 Black, 599, wherein the decision is correctly expressed by the syllabus thus:

"5. The statute of Wisconsin limiting the time "within which suits for the recovery of lands sold "for taxes must be brought begins to run from the "time of the recording of the tax deed, whether pos- "session has or has not been taken by the purchaser.

"6. It is immaterial whether the sale and the deed "be void or valid; it is sufficient that a sale has been "made and the deed recorded, to bring the statute "into activity, and after the lapse of the period "limited, to entitle the purchaser, and those claim- "ing under him, to its protection."

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A. B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Defendants in Error.

Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY
Clerk.

In the Supreme Court of the United States.

October Term, 1907.

No. 95.

GEORGE R. ELDER, Successor in Interest to SAMUEL McMILLEN, Deceased; ALICE J. McCOMBE, Administratrix of JOHN McCOMBE, Deceased, and ROWENA E. McCOMBE, by ALICE J. McCOMBE, Her Next Friend, Plaintiffs in Error,

vs.

TINGLEY S. WOOD, Impleaded with MARY M. BULLARD, ANNA L. FINNERTY and CECELIA L. WAHRER, Defendants in Error.

In Error to the Supreme Court of the State of Colorado.

BRIEF FOR DEFENDANTS IN ERROR.

CHARLES CAVENDER,
Counsel.

Smith-Brooks Printing Co., Denver.

In the Supreme Court of the United States.

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No. 95.

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In Error to the Supreme Court of the State of Colorado.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF CASE.

Prior to 1884 one Peter Finnerty and one Wilhelmina Gude were the owners of the Comstock Lode Mining Claim, U. S. Survey No. 3613, situate in California mining district, Lake county, Colorado; such

claim admittedly having been duly discovered and located on the public domain of the United States, and was, and is, a valid and subsisting mining location. (Transcript, folios 16 and 23.) In 1884 application for patent was made by said owners for said claim and the same entered for patent December 31, 1884. In 1887 the land department notified the local land office that they had erroneously included in such entry 1.82 acres of land, and that the same would be held for cancellation; and thereafter, and in 1894, proof of service of such finding upon the claimants having been made, the same was cancelled. In 1888, pursuant to the tax statutes of the state of Colorado, the property was assessed for taxes, and such taxes not having been paid, on the 5th day of August, 1889, such property was sold therefor to Charles T. Carnahan and the usual certificate issued to him. And thereafter, three years having elapsed from the date of the sale and no redemption having been made therefrom, on the 8th day of August, 1892, the county treasurer issued his tax deed for the said premises to the said Carnahan. And thereafter, and in the month of November, 1893, Carnahan conveyed the said premises to the defendant in error, Tingley S. Wood, who ever since that time has been the owner thereof. Thereafter, and in 1894, Wilhelmina Gude made deeds to Samuel McMillen and John McCombe, attempting to convey a one-third interest in said premises, and in 1899 said McMillen executed deeds to George R. Elder, plaintiff in error, attempting to convey a one-sixth interest in said premises.

On the 17th day of September, 1897, this suit was instituted in the District Court of Lake county, Colorado, where the property is situated, ostensibly in

support of an adverse claim filed in the United States land office against the issuance of the patent for the 1.82 acres of ground which had been excluded by the land office from the original entry, and also asking, by way of equitable relief, that the plaintiff be declared the owner of a one-third interest in the claim.

The plaintiff in this action was John McCombe, and afterwards, by leave of court, he having died, his heirs were made parties and also George R. Elder, one of the plaintiffs in error; the original plaintiff and Elder, as it will be noticed, claiming to have become owners of said premises by reason of deeds made long after their grantor had been divested of all interest in the property by the tax sale and the tax deed thereunder, duly recorded, the 11th day of August, 1892.

The case was tried to the court and judgment rendered for plaintiffs. From which judgment appeal was taken to the Supreme Court of the state of Colorado, the judgment was reversed and a decree directed to be entered in favor of the defendant, defendant in error here. From which judgment the Writ of Error here was taken.

ARGUMENT.

The plaintiffs in error base their right to a review by this court upon that portion of the opinion of the Supreme Court of the state of Colorado, which holds that under sections 3322-25, Mills' Ann. Stat. of Colorado, the Comstock Lode was, during the year 1888, subject to taxation; which statute is set out at pages 119-121 of the brief of plaintiff in error; so asserting in their assignments of error and in their brief that such act is unconstitutional in that it allows

taxing of property the legal title to which still remains in the United States; such contention being based upon the enabling act, for the admission of Colorado, providing among other things that no taxes shall be imposed by the state upon property therein belonging to, and which should be thereafter purchased by, the United States.

In the assignment of error for the first time appears the federal question. It is true that in the trial below and in the Supreme Court of the state it was contended, by the plaintiffs in error, that under the provisions of the Colorado statute in relation to the taxation of mines, it could not be applied to the Comstock Lode for the reason that a portion of the same had been, as it was claimed, cancelled, and then averred that it had not been shown that there was any gross product, and for other alleged defects in the assessments under said laws; for at no time was it ever held that the law was not a valid one, and in fact, the plaintiffs in error admit, on page 77 of their brief, that, under certain circumstances, the possessory right to a mining claim may be sold for taxes, although the title to the land remains in the United States, but contend that this particular piece of land is not subject to taxation.

The federal question, if there be one, not having been raised in proper time, this court will not now consider the question, even if it be in the case.

> Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Alphonsine McGrew, 188 U. S., 291.
>
> McMillan et al., Plaintiffs in Error, vs. The Ferrum Mining Company, 197 U. S., 343.

If it be contended that there was a federal question which might have been raised, still it will be found, from an examination of the opinion of the Supreme Court of the state of Colorado (Wood vs. McCombe, 86 Pac., 319; Transcript, page 59), that the decision is based on a local statute and the construction thereof, and no federal question was involved therein nor necessarily decided; and this court has repeatedly held that under such circumstances they would not review the decision.

N. Y. Cent. R. R. Co., Plaintiff in Error, vs. City of New York, 186 U. S., 269.

Mut. Life Ins. Co. vs. McGrew, 188 U. S., 291; 631 L. R. A., page 33, and the notes to said case.

Apex Transportation Co. vs. Garbad, 32 Ore., 582; L. R. A., 62, page 513.

Gillis vs. Stinchfield, 159 U. S., 658.

We contend, therefore, under the facts here shown, that the asserted federal question was not raised in apt time; and, further, that even though raised, it was not involved in the decision of the case, which passed only upon the application and effect of the state statute and its application to the facts of the case at bar.

Plaintiffs assert and, on page 26 of their brief, cite a number of authorities which they claim sustain them, that lands, the legal title to which remains in the United States, are not subject to taxation. Upon an examination of the authorities cited (as, for example, Hussman vs. Durham, 165 U. S., 145, and Central Colorado Improvement Company vs. Pueblo

County Commissioners, 95 U. S., 259), it will be found that the decisions are based upon entirely different states of fact than the case at bar. There it was the case (in Hussman vs. Durham, supra) that a location of agricultural land had been made by virtue of a land warrant, or scrip, upon which the indorsement was a forgery and the locator had no title thereto; and it was held by this court that, under such circumstances, no title, either legal or equitable, had passed from the United States, and, consequently, there was no interest that could be sold for taxes. The court, by Judge Brewer, says:

> "In order to protect a title, or to attain the ends of justice, the courts will, under the doctrine of relation, which is a fiction of law, hold that a title began at the date of an entry or location upon the public lands. But this doctrine can not be invoked to burden the holder of a title, and require him, in violation of justice, to pay taxes when he held neither the equity nor title of the lands."

And, again:

> "During these intervening years, whatever might have appeared upon the face of the record, the legal and the equitable title both remained in the government."

So in the case of the Central Colorado Improvement Company vs. Commissioners, 95 U. S., 259, the land claimed was in pursuance of a Mexican grant; and congress passed an act approving the grant, con-

ditioned that a survey of the same should be made, plats made and filed, and the expenses thereof borne by the claimant, and that when these various acts had been done, the claimant should become the owner thereof. The court held that no title vested until the claimant had complied with the requirements of the act, and, consequently, no title vested which was subject to taxation.

The reasoning of these cases, and of all of them, is that the title of the government can not be divested of its property by a tax sale, and, consequently, until some title, legal or equitable, is vested in an outsider, the same can not be sold for taxes; and when sold, it is only the title that is vested in the outsider.

That principle can not, in any particular, apply to mining property, to legal locations of mining claims, such as is the Comstock Lode Claim in the case at bar. The statutes of the United States (U. S. Revised Statutes, 2319-2324) vest, in the locator of valid mining claims, the absolute property in the same. Section 910, Revised Statutes of the United States, is as follows:

> "No possessory action between persons, in any court of the United States, for the recovery of any mining title, or any damages to any such title, shall not be affected by the fact that paramount title to the land in which such mines lie, is in the United States; but each case shall be adjudged by the law of possession."

So that, by statute, it is recognized that the real title and ownership is in the locator, and not in the

United States. And that such property is real estate and belongs to, and the title is in the locator, although the paramount title might not have passed from the government, and is capable of conveyance, inheritance and, of course, protection at law and in equity, and subject to tax levy and sale, would seem to be beyond dispute, and is so expressly declared by the statutes of Colorado as well as the statutes of other states in which such property is situated, and is so recognized by state and federal courts and repeated decisions.

Forbes vs. Gracey, 94 U. S., 767.

Belk vs. Meagher, 104 U. S., 283.

McClay vs. Equitable Ln. Soc., 152 U. S., 511.

St. Louis M. Co. vs. Montana M. Co., 171 U. S., 655.

McFeters vs. Pierson, 15 Colo., 201.

Roseville Co. vs. Iowa Gulch Co., 15 Colo., 29.

Butte Co. vs. Frank, 65 Pac., 1.

Bakersfield Co. vs. Kern Co., 77 Pac., 892.

This being true, it necessarily follows that the title held by the locator, and the possessory right acquired thereby, are subject to taxation, subject, of course, to the paramount title of the United States, which is not divested by the tax sale, but simply passes the possessory title to the purchaser thereat. It is a matter of common knowledge that in the mining states, particularly in the early days of mining camps, all property is held under location and, if the contention could be true that it be not taxable, then

the means of support of government would be lost, and, in mining states, the state governments would be bankrupt. There is no law requiring patenting of mining claims, and valid locations are as good as a patent, for all practical purposes; and if not patented then not taxable, the land department might as well close its doors, for no further applications for patent would ever be made.

The tax deed in question in this case was, as is stated by plaintiffs in error, issued in due form and in compliance with the requirements of the state as to form and a proper length of time after the sale under the assessment (Plaintiff's Brief, page 81). In Colorado we have two statutes with the reference to such deeds, as follows:

Section 3902, Mills' Ann. Stats. of Colorado:

> "The deed shall be signed by the treasurer in his official capacity, and attested by his official private seal, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also all the right, title, interest and claim of the state and county thereto, and shall be *prima facie* evidence in all courts of this state in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns,

to the land thereby conveyed, of the following facts:

"First. That the real property conveyed had not been redeemed from the sale or years stated in the deed.

"Second. That the taxes were not paid at any time before the sale.

"Third. That the real property conveyed had not been redeemed from the sale at the date of the deed.

"Fourth. That the property had been listed and assessed at the time and in the manner required by law.

"Fifth. That the taxes were levied according to law.

"Sixth. That the property was advertised for sale in the manner and for the length of time required by law.

"Seventh. That the property was sold for taxes as stated in the deed.

"Eighth. That the grantee named in the deed was the purchaser or heir at law, or the assignee of such purchaser.

"Ninth. That the sale was conducted in the manner required by law."

And section 3904, Mills' Ann. Stats. of Colorado:

"No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary, notwithstanding; *Provided, always,* That when the

owner or owners of such land, sold as aforesaid, shall, at the time of execution and delivery of the deed by the treasurer, be minor or minors, or insane or an idiot, and residing within the United States one year after such disability is removed, it shall be lawful for such person or persons, their heirs or legal representatives, to bring their suit or action for the recovery of lands so sold, and when the recovery is effected in all cases, the value of the improvements, etc., made on the land so sold, and all taxes paid after the sale thereof, with interest thereon at the rate of fifteen per cent. per annum, shall be ascertained by the jury trying the action for the recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession of the land so recovered."

By virtue of these statutes, we have a deed which is evidence of all the facts necessary to constitute a valid tax sale and to authorize a conveyance thereunder; and then a provision that, if none of these *prima facie* facts are assailed within five years from the date of the deed, then they shall become conclusive. The tax deed in this case was made, executed, delivered and recorded in the month of August, 1892 (Transcript 80, folio 80-83), and this suit was instituted, by the filing of the complaint and the issuing of the summons, on the 17th of September, 1897—five years and one month after the tax deed was regularly made, executed and recorded and title had thus,

by virtue of the statute, become unassailable by the original owner.

It is contended, however, that the sale was invalid, for the reason that the notice of the sale, although advertised for the legal length of time, was published only in the Sunday edition of the newspaper. That the actual notice was given is not denied. That the plaintiffs in this case had not notice is not alleged. That they did have actual notice is conclusively presumed, for the reason that they purchased whatever interest they did purchase long subsequent to the recording of the tax deed, of which, under our recording statute, they are bound to take notice.

Section 446, Mills' Ann. Stats.

> "All deeds, conveyances, agreements in writing of, or affecting the title to real estate or any interest therein, and powers of attorney for the conveyance of any real estate or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office, and not before, such deeds, bonds and agreements in writing shall take effect as to subsequent *bona fide* purchasers and incumbrancers by mortgage, judgment or otherwise, not having notice thereof."

The status of the plaintiffs in error, with reference to this, is well stated in the opinion of the Supreme Court:

> "It appears from the record that McCombe and McMillen acquired, by deed, the

interest of Wilhelmina Gude in the property, two years and four months before the bar of the statute attached, during which time no action was taken by them or either of them to test the validity of the tax deed, while Mr. Elder's deed, from Mr. McMillen, was dated two years and two months after the bar of the statute had attached, and about two years after this suit was commenced.

"Mr. Elder's grantor had no title in the property to convey at the time he made his deed, the same having been completely extinguished and barred under section 3904, Mills' Ann. Stats. Williams vs. Conroy, supra."

And yet it is argued that this tax sale should be vacated for reason of an error (if it be an error) committed in the publication of the notice of sale. But the statute with reference to tax sales with reference to notice and the statute of limitations are Colorado statutes and have been passed upon by the highest court of the state, which has held, as appears from the decision in this case, that the purpose of the statute of limitations was to cure just such defects as are asserted by the plaintiff herein; and that after five years they can not be availed of. That this court is bound by the construction placed upon a local statute by a local court, is almost elementary.

U. S. Revised Statutes, section 721.

Townsend vs. Todd et al., 91 U. S., 452.

Commercial Bank vs. Buckingham, 46 U. S., 317.

Allen vs. Massey, 17 Wall., 351.

Union Pacific Railroad Co. vs. Reed, 80 Fed. Rep., 239; s. c., 49 U. S. App., 421 (Eighth Circuit).

Lloyd vs. Fulton, 91 U. S., 479.

Jerome vs. Carbonate Nat'l Bank of Leadville, 22 Colo., 37.

Perkins vs. Adams, 16 Colo. App., 96.

The contention is made that no legal notice of the tax sale was given, and, consequently, that no sale took place; and many authorities are cited to show that, where there was no notice or no sale, the deed would be void. We have not thought it necessary to answer these arguments more than we have in other parts of the brief, for the reason that the contention is not true and the authorities have no application. There was a notice given and there was a tax sale thereunder, voidable, perhaps, if objection had been made in apt time, but not after the running of the statute of limitations.

It is broadly asserted that the tax deed, under which defendant claims, is void upon its face.

(a) That it shows upon its face the inclusion of illegal taxes assessed upon untaxable, unentered government land.

(b) That it shows upon its face the inclusion of untaxable, unentered government lands.

(c) That the tax deed is based upon a tax sale notice advertised exclusively on Sunday.

Why the claim is made that these asserted facts appear upon the face of the tax deed, it is impossible for us to comprehend, for the deed itself is stated, by

counsel for plaintiffs in error, to be in the usual form prescribed by statute; he stating in his brief, at page 81:

> "That the form of a tax deed is in every and all cases exactly alike, being prescribed by statute; that the only insertions by the treasurer must be the dates, the consideration, the description of the property and the execution. All errors, whether absolutely void and unbarred by the statute, or merely informalities voidable during the term of the statute, must occur in these insertions alone."

So that we have the approved form of deed in this case with the insertions properly made in accordance with the facts, and no attempt is made to show wherein there was any clerical error or anything which would call attention to any error or any mistake which had occurred in any of the transactions prior to the execution of the deed and necessary to its validity; and each and every error asserted to have been made, which would make the deed void, must be ascertained from extrinsic facts and not from the deed. It might be conceded for the purpose of the argument that the cases cited by the plaintiff to the effect that a deed void on its face could not start the running of the statute of limitations. In some states, such is undoubtedly the rule, as it was in the early days in the state of Colorado; but, in later years in this state, it has been uniformly held and it has become the law of property, that a deed which might have been avoided for errors upon its face prior to the

running of the statute, can not be availed of after limitation has run.

Crisman vs. Johnson, 23 Colo., 264.

DeForesta vs. Gast, 20 Colo., 307.

Bennet vs. N. C. S. L. & I. Co., 23 Colo., 470.

Williams vs. Conroy, 35 Colo., 117.

And this doctrine was again announced in the case at bar.

In Williams vs. Conroy, supra, it was asserted that the tax deed was void and that the proceedings under which the tax deed was made were also void, and in that case, as in this, the person making these assertions had obtained his deed to the property in question after the expiration of the five year statute; and upon such a state of facts the Supreme Court of Colorado, through Mr. Justice Campbell, clearly stated the case as follows:

> "The defendant obtained nothing by his quitclaim deed, for section 3904 Mills' Ann. Stats. says that no action for the recovery of land sold for taxes shall lie unless the same shall be brought within five years after the execution and delivery of a deed therefor by the treasurer, any law to the contrary notwithstanding. More than the full period of five years prescribed by this act of limitation had expired without any act of any sort by the patentee owner to recover possession or to question plaintiff's title under his tax deeds. The quitclaim deed gave to the defendant such right and such only as the grantor

himself had. The patentee owner's title, under 3902, Mills' Ann. Stats., was completely extinguished and barred; hence the patentee had nothing to give when he executed his quitclaim deed, and the defendant received nothing thereby."

Which announcement of law would seem to be decisive of this case.

The cases of Gomer vs. Chaffee, 6 Colo., page 314, and Redfield vs. Parks, 132 U. S., 239, are cited by plaintiff in error as supporting virtually every contention made by him with reference to the invalidity of the sale or invalidity of the tax deed, and the last case as decisive of the question that mining claims, whilst the title remains in the United States, are untaxable; and we shall accept them as his leading cases, for we think that they fully illustrate the fallacy of the position taken.

In Gomer vs. Chaffee, supra, it is not held that a tax deed might be avoided after the running of the statute, for errors, irregularities or mistakes made prior to the execution of the tax deed. In that case the deed recited that the sale occurred three days prior to the time when by statute such a sale could be advertised, and the court held, as hereinbefore stated, that the statute did not run in favor of a deed which was void upon its face by reason of lack of authority in the officers to sell, appearing therein. But as we have shown, the law now is in Colorado that the statute of limitations is what the legislature intended it to be—a curative of errors appearing either upon the face of a deed or without the deed. It is true that Judge Elbert, in the decision, stated that

> "the limitation was intended to apply to cases where the provisions of the law had been complied with * * *."

If this idea be a correct one, then the statute of limitations would be useless; for, if the law had been complied with, if no errors or mistakes had been made, then, it would seem, that there would be no necessity for the statute of limitations—the thing would be perfect in itself and could need no defense.

Redfield vs. Parks, 132 U. S., 239, was a case from Arkansas where the facts with reference to the tax sale were the same as in the case of Gomer vs. Chaffee, in that the sale was made upon a day not authorized by law; which fact appeared from the face of the deed. And it was also claimed that the property was not taxable, and the statute of limitations could not be pleaded for the reason that the title was still in the United States. Upon the first proposition, this court folowed the decision of the state of Arkansas to the effect that the statute of limitations did not run in favor of a deed void upon its face. The decision upon this point can have no application under the facts of the case at bar. Neither, as we understand it, does the statement of the law on the question as to the taxing of the land have any application, for the reason—as we have before shown—in mining locations, where the possessory right and not the property is the thing taxed and sold, it does not and could not affect the title of the United States or a grantee thereunder, but simply gives a right (obtained through the sale) to obtain a government title if the holder, or his predecessor,

complies with the statutory requirements with relation to mining claims.

Courts have at times, in furtherance of what appears to be equitable rights, been technical with reference to the requirements of a tax deed and the antecedent acts resultant therein; but in the case at bar, there would seem to be no such reason why the judgment in this case should not be affirmed. The property was and is of fluctuating value; the taxes small, and yet the owners declined to pay them, and, in consequence, the property was sold, purchased at a public tax sale, more than three years elapsed and the tax deed executed therefor, still no tax is paid. Two years thereafter, the property was purchased by the ancestor of the plaintiffs in error, other than Elder, at which time, from the recorded tax deed, they had notice of the tax sale, and yet no redemption was attempted, and, in fact, from the levying of the first taxes in 1888 until after the commencement of this suit, no taxes were paid by the plaintiffs in error or their grantors, nor did they pay any attention to the property. During all of which time the defendant in error was in possession of the property, paid the taxes thereon, and did and performed such work as was necessary to preserve the same. It would seem that the laches of the plaintiffs in error with reference to this property, of fluctuating value, would be sufficient in itself, without the statute of limitations, to defeat their action.

It seems to us that the judgment of the Supreme Court of the state of Colorado should be affirmed.

Respectfully submitted,

CHARLES CAVENDER,

Counsel for Defendants in Error.

ELDER *v.* WOOD.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 95. Argued January 9, 1908.—Decided January 27, 1908.

A valid subsisting mining location, such as the Comstock lode, or an interest therein, is property distinct from the land itself, vendible, inheritable and taxable as such, by the State, notwithstanding the land may be unpatented by the United States.

When the collection of a tax on such an interest is enforced by sale, the tax deed conveys merely the right of possession and does not affect any interest of the United States, and the construction of the state statutes, and the conformity thereto of the tax levy and sale, are matters exclusively for the state court to determine, and this court is without jurisdiction to review its decision.

Sections 340, 341 of the laws of Colorado of 1881, taxing interests in unpatented mining claims and making the right of possession the subject of levy and sale, are not in conflict with § 4 of the Colorado enabling act of March 3, 1875, 18 Stat. 474, providing that no tax shall be imposed on lands or property of the United States.

Where the Federal question below was whether a tax sale deprived the owner of his property without due process of law because the notice, being published on Sunday, was insufficient, and the state court did not pass on that question but sustained the tax title under the state statutes making tax deeds *prima facie* evidence and of limitations, the non-Federal grounds are adequate to support the judgment and this court is without jurisdiction to review it on writ of error under § 709, Rev. Stat.

37 Colorado, 174, affirmed.

THE facts, which involve the right of a State to tax the possessory right in unpatented mining claims, are stated in the opinion.

Mr. George R. Elder for plaintiffs in error:

The judgment of reversal denied the rights claimed by plaintiffs in error under two clauses of the Constitution of the United States and the similar clause of the constitution of Colorado, and the judgment of reversal could not be entered without finding, in opposition to the enabling act of Congress

and the decision of the District Court below, that United States land, whose title had not vested in the locator by purchase, was taxed. These were claims at the foundation of the entire case and were decided adversely to the rights of plaintiffs in error. The prohibitions of the Fifth and Fourteenth Amendments of the Constitution of the United States, as well as § 25 of Art. 2, constitution of Colorado, extend to any action of the State through its constituted authorities, and therefore include any divestiture of property through tax assessments, levies and tax sales, made without due process of law.

Under the following authorities this court should take jurisdiction to pass upon this writ of error. *Proprietors of Bridges* v. *Hoboken Land & Imp. Co.*, 1 Wall. 116; *Roby* v. *Colehour*, 146 U. S. 153–159; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Brown* v. *Atwell*, 92 U. S. 327; *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574; *Sayward* v. *Denny*, 158 U. S. 180; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Bells Gap Ry. Co.* v. *Pennsylvania*, 134 U. S. 232.

An advertisement of tax notice upon Sunday exclusively was not a legal notice and due process of law. *Schwed* v. *Hartwitz*, 23 Colorado, 189; *Scammon* v. *City of Chicago*, 40 Illinois, 146; Blackwell, Tax Title (2d ed.), § 210; Blackwell, Tax Titles (5th ed.), § 440; *Ormsby* v. *Louisville*, 79 Kentucky, 199; *Sawyer* v. *Cargile*, 72 Georgia, 290; *Brannin* v. *Louisville*, 4 Ky. Law Rep. 384; *McLaughlin* v. *Wheeler*, 2 S. Dak. 379; *Shaw* v. *Williams*, 87 Indiana, 158.

The United States still owning the fee to the land while the entry remained cancelled, it could not be taxed and sold.

While part of the claim was still owned by the United States after the cancellation, the incorporation of illegal taxes upon this part with other taxes levied upon the other part of the claim, rendered the whole sale void *in toto*.

The Government, through its Land Department, has never completely changed the ownership of this Comstock lode

from itself to the holders of the possessory title. It still retains the entire title, at its own disposition, to be finally parted with after the several contests before the land officers and the courts are at last decided.

There has been no proper segregation of the area of the Comstock lode and issuance of such a muniment of title by the Land Department of the United States to bring it within the purview of the taxing power of the State of Colorado, certainly not up to the twenty-first day of September, 1896, the date of the partial re-instatement of the entry.

The refusal of the Land Department of the Government to confirm the mineral entry of the Comstock lode in its entirety from its first order of cancellation May 2, 1887, up to and until September 21, 1896, a period of nine years and four months, is proof positive that no full equitable title passed to the grantees by those proceedings and that the Government through its Land Department still held full control of the land and by its various rulings established the fact that the right to patent in the location claimants was incomplete. *Kansas P. Ry. Co.* v. *Prescott*, 16 Wall. 603; *Union Pac. R. R. Co.* v. *McShane*, 22 Wall. 444; *Northern Pac. R. R. Co.* v. *Traill Co.*, 115 U. S. 600; *Hunnewell* v. *Cass Co.*, 22 Wall. 464; *Central Colo. I. Co.* v. *Pueblo Co.*, 95 U. S. 259; *Lamborn* v. *Dickinson Co.*, 97 U. S. 181; *Union Pac. R. R. Co.* v. *Dodge Co.*, 98 U. S. 541; *People* v. *Shearer*, 30 California, 645; *Central P. R. R. & Co.* v. *Howard*, 51 California, 229; *Long* v. *Culp*, 14 Kansas, 412; *White* v. *B. & M. R. R. Co.*, 5 Nebraska, 393; *Elling* v. *Thexton*, 7 Montana, 330; *Musser* v. *McRae*, 38 Minnesota, 409; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Wisconsin Cent. R. R. Co.* v. *Price Co.*, 133 U. S. 496; *Hussman* v. *Durham*, 165 U. S. 145; *Campbell* v. *Spears*, 120 Iowa, 670; *Duncan* v. *Newcomer*, 9 S. Dak. 375; *Pitts* v. *Clay*, 27 Fed. Rep. 635.

Mr. Aldis B. Browne for defendants in error. *Mr. Charles Cavender* was on the brief:

If it be contended that there was a Federal question which

might have been raised, still it will be found, from an examination of the opinion of the Supreme Court of the State of Colorado, *Wood* v. *McCombe*, 37 Colorado, 174; *S. C.*, 86 Pac. Rep. 319, that the decision is based on a local statute and the construction thereof, and no Federal question was involved therein nor necessarily decided. This court will not review such a decision. *N. Y. Cent. R. R. Co.* v. *City of New York*, 186 U. S. 269; *Mut. Life Ins. Co.* v. *McGrew*, 188 U. S. 291; *S. C.*, 63 L. R. A. 33, and the notes to said case; *Apex Transportation Co.* v. *Garbad*, 32 Oregon, 582; *S. C.*, 62 L. R. A. 513; *Gillis* v. *Stinchfield*, 159 U. S. 658.

Rev. Stat. §§ 2319–2324 vest, in the locator of valid mining claims, the absolute property in the same. And see § 910, Rev. Stat.

By statute the real title and ownership is in the locator, and not in the United States. Such property is real estate and belongs to, and the title is in the locator, although the paramount title might not have passed from the Government, and is capable of conveyance, inheritance and protection at law and in equity, and is also subject to tax levy and sale. It is expressly so declared by the statutes of Colorado and other States in which such property is situated, and is so recognized by state and Federal courts in repeated decisions. *Forbes* v. *Gracey*, 94 U. S. 767; *Belk* v. *Meagher*, 104 U. S. 283; *Manuel* v. *Wolff*, 152 U. S. 505, 511; *St. Louis M. Co.* v. *Montana M. Co.*, 171 U. S. 655; *McFeters* v. *Pierson*, 15 Colorado, 201; *Roseville Co.* v. *Iowa Gulch Co.*, 15 Colorado, 29; *Butte Co.* v. *Frank*, 65 Pac. Rep. 1; *Bakersfield Co.* v. *Kern Co.*, 77 Pac. Rep. 892.

It necessarily follows that the title held by the locator, and the possessory right acquired thereby, are subject to taxation, subject, of course, to the paramount title of the United States, which is not divested by the tax sale, but simply passes the possessory title to the purchaser thereat.

The statute with reference to tax sales, with reference to notice, and the statute of limitations are Colorado statutes and

have been passed upon by the highest court of the State, which has held, as appears from the decision in this case, that the purpose of the statute of limitations was to cure just such defects as are asserted by the plaintiff herein; and that after five years they cannot be availed of. This court is bound by the construction placed upon a local statute by a local court. U. S. Rev. Stat. § 721; *Townsend* v. *Todd et al.*, 91 U. S. 452; *Commercial Bank* v. *Buckingham*, 5 How. 317; *Allen* v. *Massey*, 17 Wall. 351; *Union Pacific R. R. Co.* v. *Reed*, 80 Fed. Rep. 239; *S. C.*, 49 U. S. App. 421 (Eighth Circuit); *Lloyd* v. *Fulton*, 91 U. S. 479; *Jerome* v. *Carbonate Nat. Bank of Leadville*, 22 Colorado, 37; *Perkins* v. *Adams*, 16 Colo. App. 96.

Mr. Justice Moody delivered the opinion of the court.

The plaintiff in error brought this action in a District Court of the State of Colorado to recover from the defendants in error the possession of an undivided interest in the Comstock Lode mining claim, situated in that State. Both parties claimed title under Wilhelmina Gude, who was agreed to have been the owner of the interest in dispute; the defendants under a sale for taxes assessed upon her interest, made August 5, 1889, and a deed in pursuance of the sale made August 8, 1892, and recorded August 11, 1892; the plaintiffs under a quitclaim deed of her interest made April 5, 1894, and duly recorded. The tax title was the earlier, and possession of the interest in dispute was held by those claiming under that title for more than five years, which is the period of the statute of limitations of Colorado applicable to such a case. The plaintiffs, however, insisted that the tax title was void, and the judge of the trial court so found, and entered judgment for the plaintiffs, which was reversed by the Supreme Court of the State and judgment for the defendants ordered, *sub nomine*, *Wood* v. *McCombe*, 37 Colorado, 174. The case is here upon writ of error to the latter court.

The plaintiff's contention is that the tax title was void for two reasons: first, because the property was not subject to

state taxation, as the title to the land was in the United States, and therefore the levy of the tax was a nullity; second, because the notice of the sale for taxes was published only in a Sunday newspaper, and therefore the sale was a nullity. The further contention is then made that the tax deed for these reasons was void and did not afford color of title sufficient for the purpose of the statute of limitations.

The judgment under review, however, determined that the interest of Wilhelmina Gude was liable to taxation under the laws of the State, although the land on which it was located had not been patented to her or entered for patent by her; that the possession was the subject of the assessment, and that the right of possession passed by the tax sale; that a tax deed was by a state statute *prima facie* evidence *inter alia* "that the property was duly and lawfully advertised for sale;" that the tax deed was not void upon its face, and that it constituted a sufficient color of title to satisfy the statute of limitations; and, finally, that as this action was not brought within five years after the delivery of the tax deed it was barred by that statute, which provided that "no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer."

The question for decision here is only whether this judgment denied to the plaintiffs any Federal rights duly claimed by them in the state court, and we have no right to inquire further.

1. The title to the land on which this mining claim was located was in the United States. It was a part of the public lands, and although proceedings had been begun by the owners of the claim for the acquisition of the title to the land by patent, they were not concluded at the time of the assessment of the tax, and apparently no patent has ever been issued. Obviously the land was not taxable as the property of Wilhelmina Gude. The act by which the people of the Territory of Colorado were enabled to form a State (§ 4 of act approved March 3, 1875, c. 139, 18 Stat. 474) provided that no taxes

should ever be imposed upon lands or property of the United States. The claim of a Federal right was based upon this statute. But, assuming that under this statute a Federal question is raised, there was no taxation of the land in the case at bar. A statute of Colorado authorized the taxation of mining claims, whether patented or entered for patent or not, in these words: "In case the mine or mining claim shall not be patented, or entered for patent, but shall be assessable and taxable under this act, on account of producing gross proceeds, then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado." Laws 1887, §§ 340–341, Mills' Ann. Stat. §§ 3222–3225. The construction of this statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the Supreme Court of the State, and we have no authority to review its determination of them. That court held that what was assessed was not the land on which the mining claim was located, but the claim itself, that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock Lode was a "valid subsisting mining location," and at the time of the assessment of the tax Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendible, inheritable and taxable. *Forbes* v. *Gracey*, 94 U. S. 762; *Bell* v. *Meagher*, 104 U. S. 279, 283; *Manuel* v. *Wulff*, 152 U. S. 505, 510; *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 655; 1 Lindley on Mines, §§ 535–542, inclusive. The State therefore had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest of the United States.

2. The tax deed under which the defendant in error Wood claims title was executed in pursuance of a sale made upon

a notice published only in a Sunday newspaper. This fact does not appear from the deed itself, as an analogous infirmity appeared in the tax deed before the court in *Redfield* v. *Parks*, 132 U. S. 239. The deed upon its face was a valid instrument, and could be impeached only by evidence *aliunde*. The state court did not deem it necessary to consider whether such a notice was sufficient, because it held that a state statute made such a deed *prima facie* evidence of the sufficiency of the notice, and that possession under such a deed for the prescribed period met the requirements of the state statute of limitations. The decision therefore did not reach the only Federal question which can be imagined with respect to this part of the case, namely, that a sale upon such a notice was wanting in due process of law, but rested upon entirely adequate grounds of a non-Federal nature. Whether the decision of the question of state law was right or wrong, we may not consider. It is enough that the judgment proceeded solely upon the state law, and that the state law was adequate to dispose of the case without reaching any Federal question. *Leathe* v. *Thomas*, 207 U. S. 93. We need not, therefore, consider whether this Federal question was properly raised in the court below, or whether a sale upon such a notice would be a denial of due process of law in violation of the Fourteenth Amendment of the Constitution.

The plaintiffs in error have shown no violation of Federal right, and the judgment of the Supreme Court of Colorado is

Affirmed.